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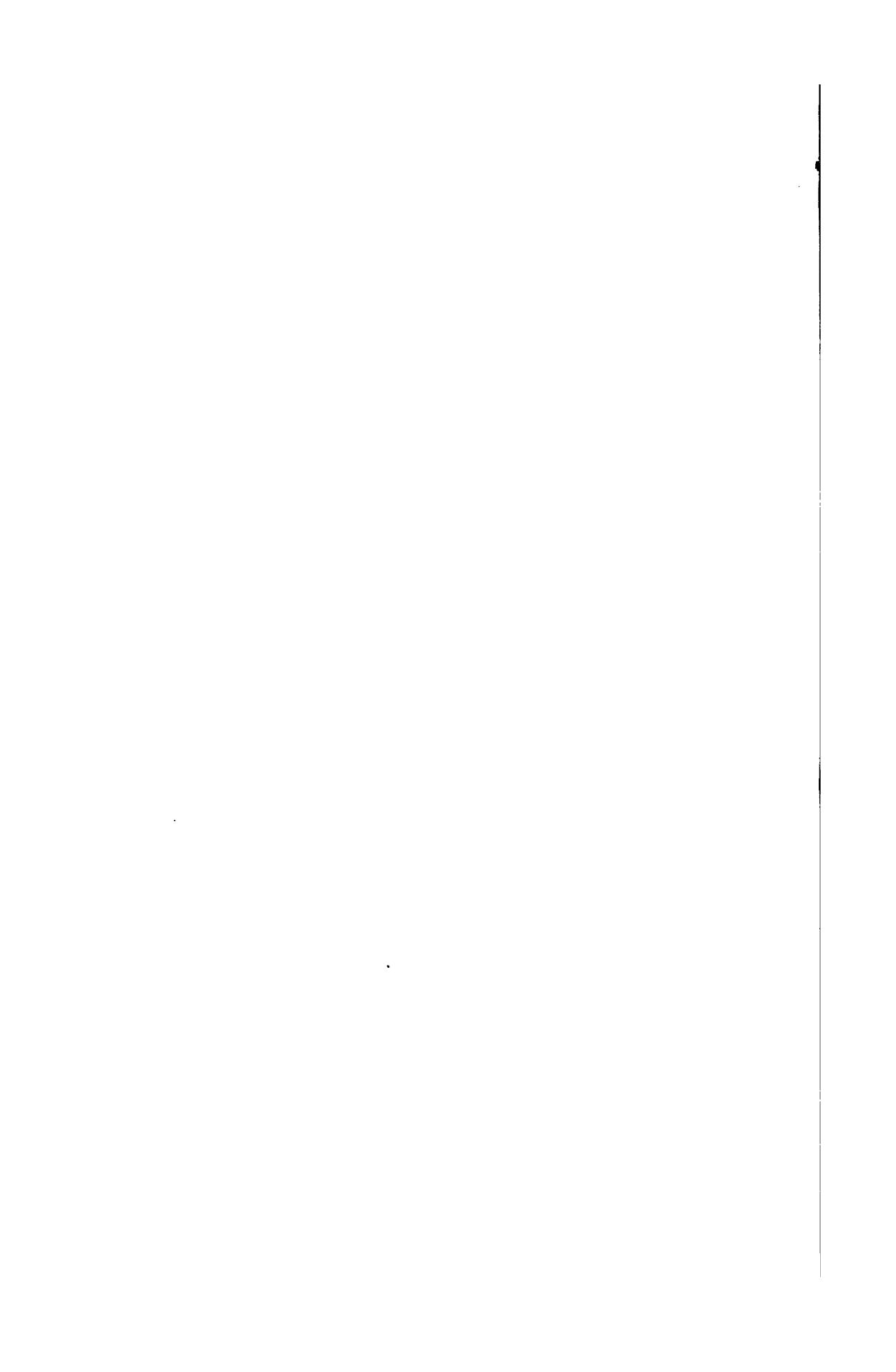


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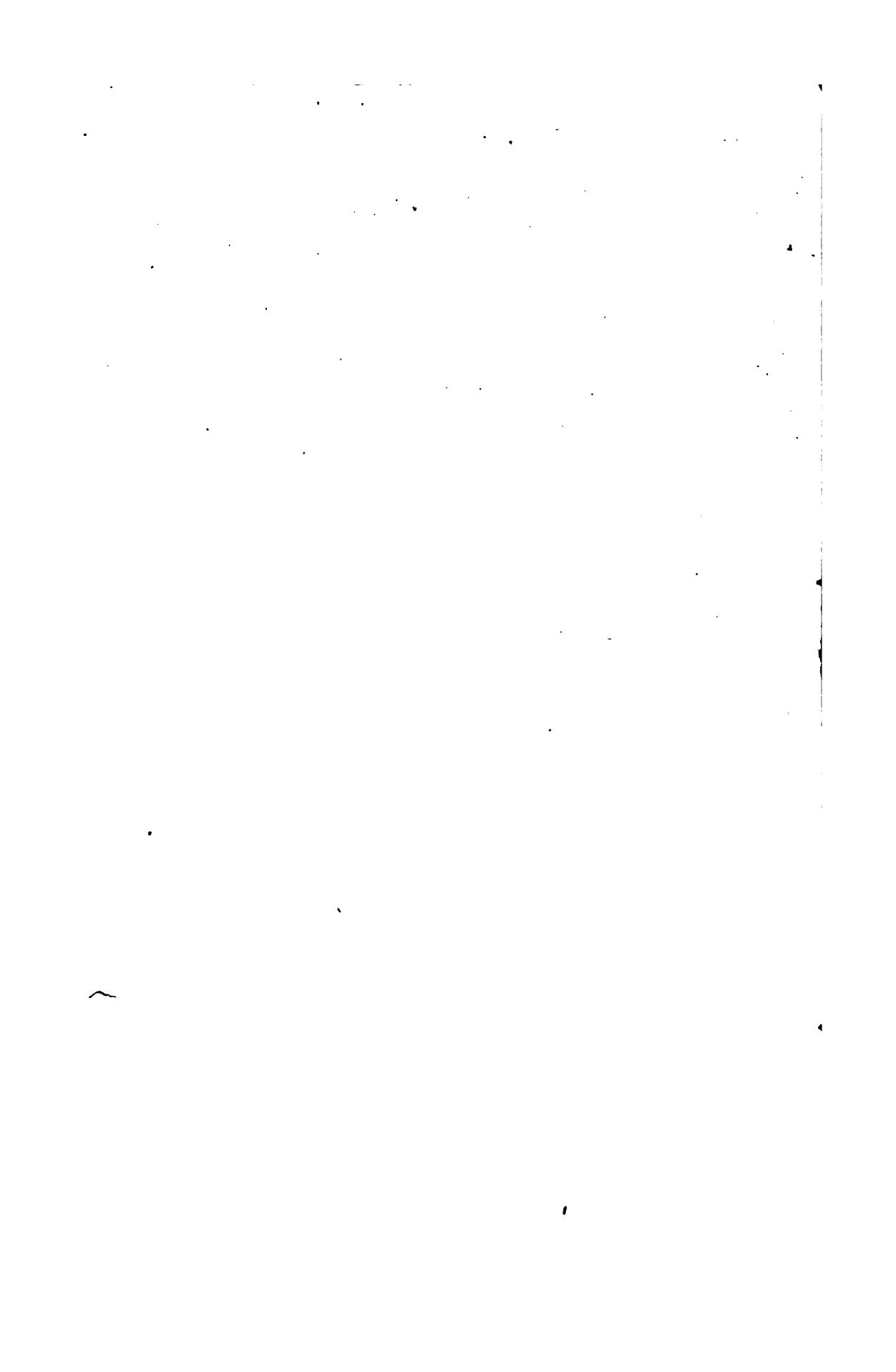
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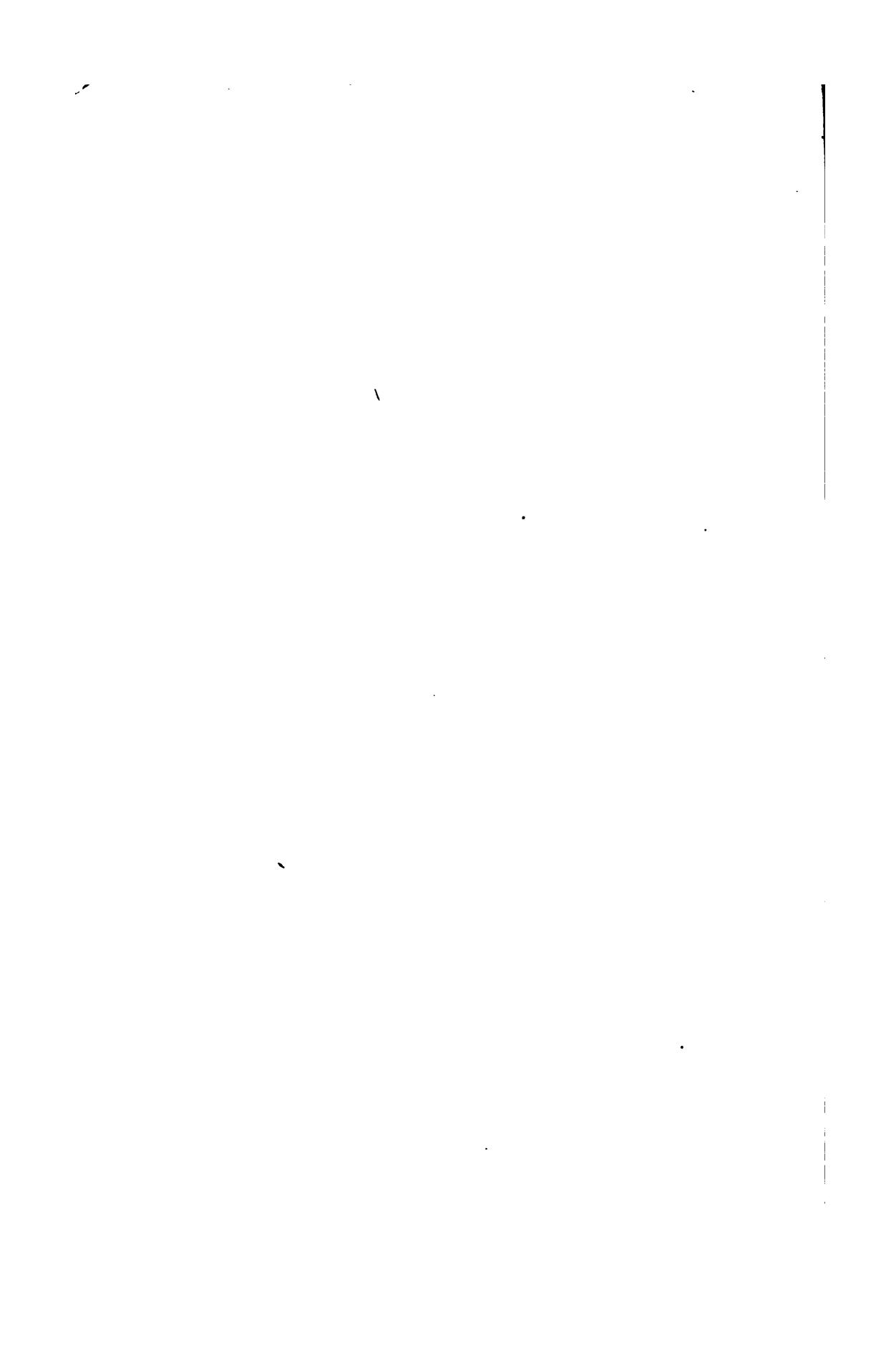
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19	1	19	30	19	72	19	105	19	146	19	207	19	267	19	347	19	404	19	462	
19	235	24	215	19	168	43	290	37	505	40	69	21	334	20	341	29	315	19	461	
23	618	24	234	36	128	52	153	76	74	76	438	19	271	25	470	45	311	36	291	
77	344	34	183	36	294	70	188	19	148	92	418	31	62	62	543	64	28	73	70	
81	198	37	182	43	19	92	586	21	425	96	420	23	255	74	262	114	548	82	418	
19	7	41	403	55	393	19	110	19	151	19	211	35	172	93	575	19	406	19	467	
22	470	44	23	73	141	45	126	44	22	32	405	52	13	19	351	48	239	19	461	
23	290	47	9	81	389	61	287	60	68	19	212	58	3	19	471	19	407	67	474	
39	57	55	319	110	230	68	245	66	156	21	206	108	272	20	103	402	86	247		
43	533	56	94	19	83	97	212	74	162	98	399	19	273	21	523	44	540	19	470	
70	159	58	180	22	110	19	112	87	168	19	213	35	109	47	525	44	552	20	507	
93	239	62	313	19	84	36	158	92	449	21	140	19	274	19	356	19	418	23	47	
97	51	64	152	50	29	19	117	19	152	23	369	40	547	27	241	19	421	89	490	
103	167	72	407	87	21	445	44	330	37	38	87	94	47	525	104	561	190	283		
110	113	88	193	34	313	31	109	46	371	49	199	121	259	61	387	20	466	190	283	
110	220	108	319	36	382	38	298	56	54	43	443	19	290	78	573	44	215			
19	10	46	349	44	349	66	71	45	79	36	128	88	329	51	415					
19	369	19	40	46	536	108	493	19	165	59	360	41	491	99	316	19	431			
22	105	20	484	60	314	19	121	86	83	83	175	19	291	106	208	48	420			
39	270	30	242	61	158	20	264	19	170	21	245	19	222	36	503	19	359	53	67	
41	199	38	148	80	210	83	121	86	83	83	175	19	292	22	70	19	432			
44	336	38	536	19	123	23	91	40	465	46	312	19	225	23	112	48	221	48	283	
46	519	41	491	96	196	40	465	46	312	96	332	54	161	19	294	49	148	48	412	
51	322	51	444	96	309	47	332	88	37	54	466	74	227	53	360	54	460			
52	337	52	580	107	566	64	94	121	435	23	176	45	312	19	367	105	568			
58	289	64	566	65	72	129	44	19	226	19	298	75	83	74	168					
60	368	19	42	19	90	81	590	19	173	85	558	97	559	19	364	82	198			
61	442	21	215	57	184	86	253	64	114	19	227	19	312	32	510	82	201			
68	358	37	550	19	99	19	125	19	175	19	228	33	209	40	583	85	456			
68	397	104	241	25	71	61	160	20	338	19	233	43	485	101	278					
71	267	19	44	46	372	19	127	19	178	23	618	43	512	19	367	105	568			
76	402	31	196	56	53	90	49	19	202	32	519	46	454	46	518	51	329	19	438	
76	494	21	206	68	128	38	516	20	134	32	534	19	313	52	337	41	130			
80	383	23	18	79	363	81	52	22	179	77	344	56	571	71	267	46	79			
83	198	27	407	85	569	19	128	36	503	81	198	20	315	19	370	73	379			
86	236	54	261	115	422	42	560	19	180	83	600	20	134	21	511	45	931	91	34	
91	138	75	123	19	93	53	360	23	157	19	238	21	511	19	371	31	469			
93	44	98	249	19	129	79	384	79	148	70	451	19	383	39	57					
96	158	100	313	19	140	19	130	23	152	19	242	26	316	40	97	19	383	39	57	
100	447	23	95	19	29	28	364	32	347	60	172	20	134	106	161					
107	426	19	48	36	382	21	195	56	268	32	473	60	172	20	134	106	161			
109	586	51	468	46	349	22	195	56	268	33	104	19	324	39	390	65	181			
120	599	100	205	46	536	22	179	19	185	46	145	19	324	19	384	19	450			
19	15	19	53	60	314	22	234	53	303	47	40	20	134	21	248	60	514			
89	572	36	315	83	553	25	317	88	258	53	93	19	324	39	390	65	181			
19	19	73	114	87	230	33	488	19	190	121	67	19	326	68	244	70	489			
51	438	19	60	92	421	42	297	63	523	19	247	23	382	19	389	81	186			
56	163	37	525	96	176	42	320	19	192	20	95	34	135	35	284	86	185			
19	22	92	41	96	309	50	271	26	326	36	93	41	549	103	370					
110	450	19	66	97	500	56	516	38	116	19	253	44	103	19	390	111	177			
19	24	93	263	107	566	65	520	83	28	28	150	44	103	19	390	111	177			
52	406	19	98	19	98	72	349	19	192	79	4	75	245	20	134	121	214			
53	338	19	68	37	519	77	573	38	116	96	449	84	328	19	391	87	175			
56	163	19	122	41	491	96	48	51	61	107	379	100	246	65	520	107	359			
19	27	32	315	70	445	99	461	19	194	19	255	19	328	67	418	108	143			
57	184	23	6	80	25	19	135	61	141	48	467	41	130	19	369	33	53			
19	98	95	8	90	49	20	328	83	411	19	256	60	8	44	498	30	265			
21	193	25	529	19	99	20	49	83	411	48	467	41	130	19	401	44	363			
23	234	32	18	21	277	22	328	40	19	203	48	561	19	328	21	431	29	161	51	73
44	212	58	248	24	37	38	38	516	93	340	80	373	21	431	39	170	51	273		
59	384	60	575	19	101	38	77	314	19	203	19	259	19	334	40	274	62	201		
68	123	62	276	51	168	22	178	104	325	41	485	29	572	60	231	62	271			
68	481	108	10	92	508	19	138	37	301	24	457	22	61	53	287	62	315			
69	591	107	19	96	142	22	178	104	325	41	485	29	572	60	231	62	271			
94	174	101	174	48	450	19	204	49	362	64	430	80	398	97	24					
19	30	117	25	69	294	23	588	52	135	75	582	19	347	48	239	98	59			
37	346	121	171	19	142	32	331	68	117	20	241	19	349	86	215					
121	557	19	232	25	53	89	253	103	53											



INDIANA REPORTS.

VOL. XIX.



June 20

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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA.

WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY MICHAEL C. KERR,
OFFICIAL REPORTER.

VOL. XIX.

CONTAINING THE CASES DECIDED AT THE NOVEMBER TERM,
1862, TOGETHER WITH CERTAIN CASES DECIDED AT
PREVIOUS TERMS, AND HELD OVER ON PETI-
TION FOR REHEARING AND OTHERWISE.

♦♦♦

CINCINNATI, OHIO:

STEREOTYPED AT THE FRANKLIN TYPE FOUNDRY.

1863.

0-126921

Entered according to Act of Congress, in the year 1863, by

MICHAEL C. KERR,

In the Clerk's Office of the District Court of the United States, within and for the
District of Indiana.

STEREOTYPED AT THE FRANKLIN TYPE FOUNDRY, CINCINNATI, O.

Rec Jan 7. 1864

J U D G E S
OF THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
DURING THE
PERIOD COMPRISED IN THIS VOLUME.

JAMES M. HANNA,
SAMUEL E. PERKINS,
ANDREW DAVISON,
JAMES L. WORDEN.

Judge HANNA was Chief-Justice at the November Term, 1862.

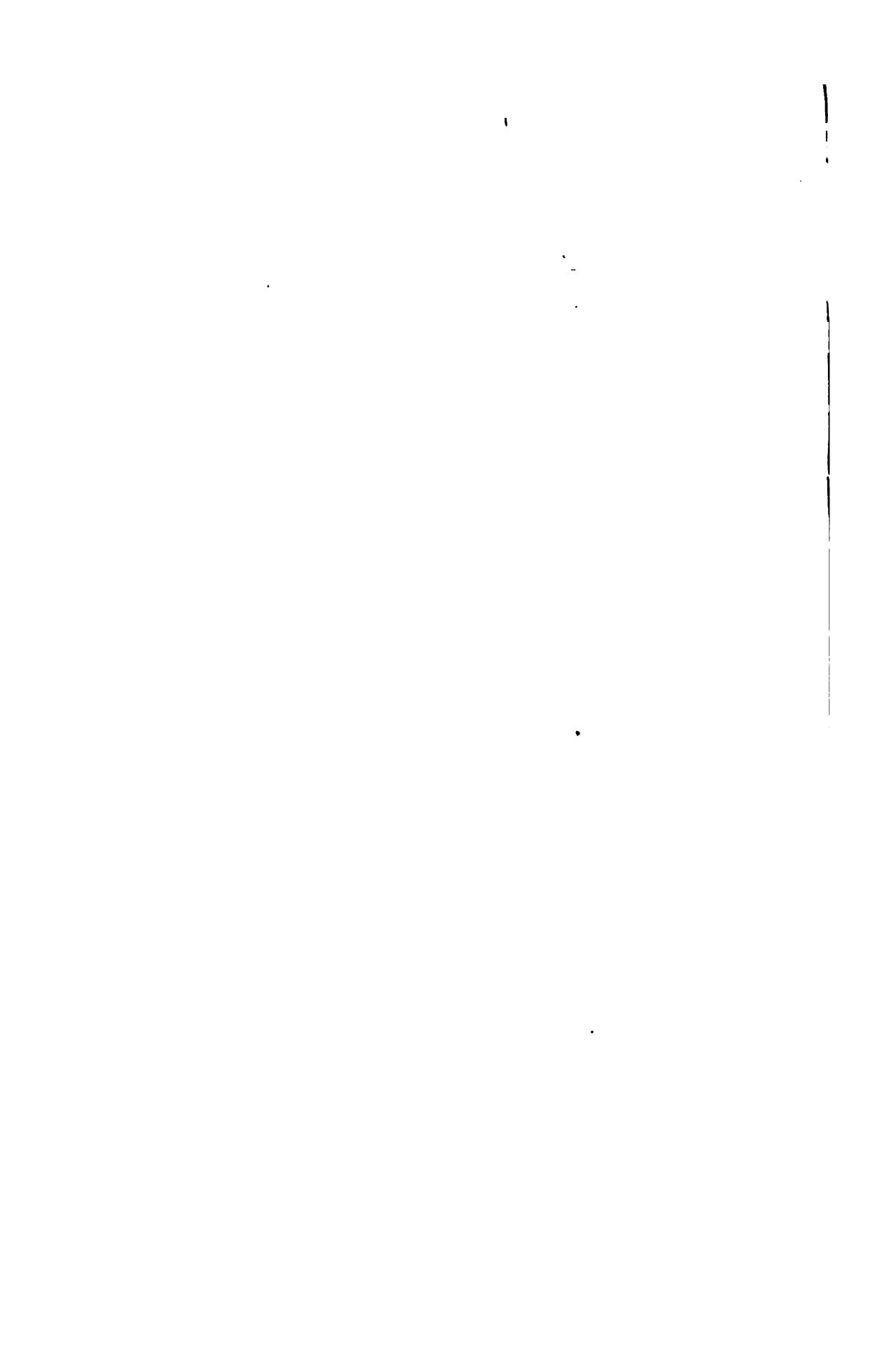
LIST OF JUDGES
OF THE
CIRCUIT COURTS OF THE STATE OF INDIANA
DURING THE
PERIOD EMBRACED IN THIS VOLUME.

Names.		Date of Commission.	Circuit.	Residence.
JOSEPH W. CHAPMAN.....		October 27, 1858..	1..	Madison.
GEORGE A. BICKNELL.....		December 25, 1858..	2 ..	New Albany.
MICHAEL F. BURKE.....		November 6, 1858..	3..	Washington.
REUBEN D. LOGAN.....		November 7, 1859..	4..	Rushville.
FABIUS M. FINCH.....		October 24, 1859..	5..	Franklin.
SOLOMON CLAYPOOL.....		November 6, 1858..	6..	Terre Haute.
JOSEPH S. BUCKLES.....		October 26, 1858..	7..	Muncie.
JOHN M. COWAN.....		November 1, 1858..	8..	Frankfort.
ANDREW L. OSBORN.....		November 16, 1857..	9..	La Porte.
EDWARD R. WILSON.....		October 25, 1858..	10..	Fort Wayne.
HORACE P. BIDDLE.....		October 26, 1860..	11..	Logansport.
CHARLES H. TEST.....		October 27, 1857..	12..	La Fayette.
JEHU T. ELLIOTT.....		October 21, 1861..	13..	New Castle.
WILLIAM F. PARRETT.....		November 5, 1859..	15..	Booneville.

LIST OF THE JUDGES
OF THE
COURTS OF COMMON PLEAS
IN THE
STATE OF INDIANA,
DURING THE
PERIOD EMBRACED IN THIS VOLUME.

Names.	Date of Commission.	District.
JOHN PITCHER.....	October 25, 1860.....	1.
RICHARD A. CLEMENTS.....	October 26, 1860.....	2.
DAVID T. LAIRD.....	November 1, 1862.....	3.
AMOS LOVERING.....	October 25, 1860.....	4.
FRANCIS ATKINSON.....	October 26, 1860.....	5.
JEREMIAH M. WILSON.....	October 25, 1860.....	6.
BEATTIE McCLELLAN.....	November 1, 1862.....	7.
GEORGE A. BUSKIRK.....	October 26, 1860.....	8.
FREDERICK T. BROWN.....	October 26, 1860.....	9.
CHARLES Y. PATTERSON.....	October 20, 1860.....	10.
DAVID S. GOODING.....	October 18, 1861.....	11.
CHARLES A. RAY.....	November 1, 1862.....	12.
ISAAC NAYLOR.....	October 25, 1860.....	13.
JOHN GREEN.....	October 25, 1860.....	14.
DAVID P. VINTON.....	October 28, 1861.....	15.
WILLIAM C. TALCOTT.....	October 25, 1860.....	16.
ELISHA EGBERT.....	October 25, 1860.....	17.
JACOB M. HAYNES.....	October 25, 1860.....	18.
WILLIAM M. CLAPP.....	October 25, 1860.....	19.
JOSEPH BRECKENRIDGE.....	October 27, 1860.....	20.
DAVID D. DYKEMAN.....	November 1, 1862.....	21.

VOL. XIX.—*b*



ROLL OF ATTORNEYS

ADMITTED TO PRACTICE IN THE SUPREME COURT OF INDIANA.

Jeremiah Sullivan, William J. Peaslee,
James Morrison, John Pettit,
Henry P. Thornton, Richard M. Thompson,
Stephen C. Stevens, Samuel C. Willson,
John Law, John B. Howe,
William Z. Stewart, Simon Yandes,
Amory Kinney, Daniel Mace,
Isaac Naylor, John B. Niles,
Michael G. Bright, Robert C. Gregory,
Samuel Judah, Zebulon Baird,
Charles H. Test, Jeremiah Smith,
James Perry, Andrew Davidson,
Randall Crawford, Robert Brackenridge,
Abner Ellis, William H. Combs,
Addison L. Roche, John Brownlee,
Caleb B. Smith, Walter March,
John Cowgill, William T. Otto,
David McDonald, John P. Usher,
John S. Newman, Andrew L. Robinson,
David Kilgore, Beattie McClellan,
David H. Colerick, William H. Mallory,
John L. Ketcham, Andrew L. Osborn,
Samuel B. Gookins, Joseph W. Chapman,
James Collins, Jacob B. Julian,
Christian C. Nave, George W. Julian,
Stephen Major, Daniel D. Pratt,
Jonathan A. Liston, Godlove S. Orth,
George Holland, Horace B. Biddle,
Abraham A. Hammond, James Wilson,
John Dumont, Albert G. Porter,

James Y. Allison,
Ebenezer Dumont,
John S. Reid,
Napoleon B. Taylor,
Joseph E. McDonald,
Fabius M. Finch,
John T. Morrison,
Samuel A. Huff,
John Yaryan,
James A. Fazy,
Martin M. Ray,
Jesse P. Siddall,
Edward H. Brackett,
Thomas J. Sample,
Conrad Baker,
Lorenzo C. Dougherty,
William A. Bickle,
Hiram W. Chase,
James G. Jones,
John Green,
James Bradley,
Thomas L. Smith,
John Davis,
Robert L. Walpole,
James E. Blythe,
Horatio C. Newcomb,
William Wallace,
Orville L. Hamilton,
Theodore Gazlay,
Joseph K. Edgerton,
John S. Scobey,
John D. Howland,
George V. Howk,
Thomas D. Walpole,
Andrew Allison,
John M. Wallace,
Asahel W. Hubbard,
John A. Wilstach,
Nimrod H. Johnson,
Nathaniel T. Hauser,
Benjamin F. Myers,
John W. Spencer,
William C. Wilson,
Martin L. Bundy,
Davis Newell,
William Henderson,
William S. Holman,
John Coburn,
William McKee Dunn,
Amos Lovering,
Joseph Cox,
Andrew H. Evans,
Elijah B. Martindale,
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Alphonso A. Cole,
Joseph S. Buckles,
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Lewis Wallace,
Oliver P. Morton,
Charles Crufts,
William F. Lane,
Thomas Means,
David S. Gooding,
Jonathan W. Gordon,
William Grose,
William A. Peele,
Richard A. Clements,
John R. Coffroth,
James R. Slack,
Harvey M. Vaile,
William M. Franklin,
James L. Worden,
James M. Gregg,
Daniel M. Cox,
William Garver,
David Moss,

John G. Crain,
Benjamin F. Claypool,
Delana E. Williamson,
Charles Y. Patterson,
Abram W. Hendricks,
James B. Merriwether,
Barton W. Wilson,
William W. Carson,
Cyrus Wright,
James Harrison,
Gustavus H. Voss,
Cyrus L. Dunham,
Nathan O. Ross,
Larkin Reynolds,
Thomas H. Nelson,
Charles E. Walker,
Luke Reilly,
Duane Hicks,
Oscar B. Hord,
Isaac Vandeventer,
William R. Harrison,
Robert T. St. John,
Dewitt C. Chipman,
Michael F. Burke,
Richard A. Clements, Jr.,
Andrew J. Boone,
Thomas J. Cason,
Charles Case,
John H. Gould,
James Hughes,
Horace Heffren,
Ephraim A. Greenlee,
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Charles H. Burchenal,
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Wilson Morrow,
George W. Turner,
Avery W. Bullock,

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Cyrus A. Kilgore,
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John Cavin,
H. W. Harrington,
James N. Sweetser,
James M. Hanna,
Cyrus C. Hines,
James W. Eldridge,
James R. M. Bryant,
Benjamin Harris,
Edward E. Bassett,
Warren H. Withers,
Ballard Smith,
Jonathan Gardner,
W. R. Pierce,
J. C. McIntosh,
Reginald H. Hall,
Thomas T. Crittenden,
Newton F. Malotte,
John L. Knight,
N. R. Lindsay,
Samuel Pepper,
O. B. Torbet,
Asa Iglehart,
C. Stewart Ellis,
John H. Cook,
Sims A. Colley,
Leroy Pope,
R. J. Bright,
Jesse Harper,
D. P. Vinton,
David H. Weir,
Lysander C. Jacobs,
R. P. Davidson,
Edwin Walker,
Patrick H. Jewett,
A. L. Hathaway,
Francis Smith,
Lemuel W. Gooding,
Omar Newman,
George W. Wittsell,
H. S. Kelley,
James Brownlee,
Alexander McDonald,
Orris Blake,
John M. Wilson,
Lindley M. Ninde,
George E. Gordon,
John L. Miller,
Solomon Claypool,
Daniel Royse,
Nelson Pierson,
Charles M. Shook,
Arthur J. Simpson,
David Turpie,
Frederick Rand,
William K. Edwards,
George H. Chapman,
James N. Edgar,
Adams Y. Hooper,
Elisha Egbert,
Bayless W. Hanna,
M. Igoe,
John B. Goodrich,
Jonathan H. Jones,
Isaac A. Rice,
M. M. Milford,
Solomon Mahon,
Henry C. Hanna,
H. Berry, Jr.,
Richard Robbins,
R. M. Kelly,
Frank J. Mattler,
Adolph Seidensticker,
Charles Coulon,
Herman B. Payne,
Francis L. Neff,

ROLL OF ATTORNEYS.

xv

Thomas G. Harris,	Henry A. Downey,
Moses Jenkinson,	Charles W. Moore,
Thomas S. Stanfield,	William B. Biddle,
Robert B. Jones,	Harvey D. Scott,
Henry D. Washburne,	David D. Dykeman,
John N. Evans,	Jeremiah Bundy,
James F. McDowell,	Lucius Bingham,
John S. Davis,	James Park,
Joseph H. Brown,	Wilson B. Laughridge,
William P. Fishback,	John Guthrie,
Rawson Vaile,	O. M. Wilson,
Isaac Jenkinson,	John T. Gunn,
William D. Lee,	William P. Debolt
Robert M. Weir,	Thomas W. Bennett,
Michael C. Kerr,	David O. Daily,
John H. Stotsenburg,	Alexander A. Rice,
William F. Parrett,	William C. L. Taylor,
B. K. Elliott,	Lewis H. Goodwin,
William H. Schlater,	Nathaniel Usher,
William A. Porter,	John C. Green,
David D. Banta,	Henry Crawford,
O. H. Main,	Joseph P. Edson,
Thomas W. Woollen,	Lewis Jordan,
John H. Redstone,	Henry B. Sayler,
Watt J. Smith,	William P. Rhodes,
Newton Burwell,	Gideon Putnam,
William H. Scott,	John F. Read,
Alexander Thompson,	Benjamin Harrison,
Isaac S. Stewart,	Thomas M. Brown,
Francis J. Hord,	Calvin Taylor,
John M. Washburne,	M. K. Farrand,
John H. Popp,	Jos. Smith,
Solon Turman,	W. W. Leathers,
William Mack,	John M. Butler,
William K. Marshall,	W. R. West,
Albert E. Redstone,	D. P. Baldwin,
Thomas B. Ward,	A. D. Mathews,
James A. Scott,	John R. Risley,
William T. Smith,	James L. Mitchell,

John F. Julian,	Benjamin F. Havens,
John C. Bufkin,	James J. Best,
Thomas L. Waterhouse,	Solomon Blair,
Augustus A. Chapin,	Gains Brook,
Robert W. Harrison,	A. P. Ferris,
F. W. Viehe,	John T. Dye,
Daniel W. Mason,	Joseph B. Wade,
John Reiley,	William A. Woode,
Lewis D. Stubbs,	John K. Thompson,
Jonathan C. Applegate,	Alfred Kilgore,
Neal E. Hosford,	William H. Dills,
Jasper M. Dresser,	A. B. Kennedy,
Jason B. Brown,	William L. Campbell,
William M. Lamphere,	Paris C. Dunning,
John D. Gougar,	Stephen G. Burton,
Harry Burns,	Alfred B. Collins,
William Waters,	Simeon K. Wolfe.

NOTE.—The foregoing list of attorneys is taken from the roll kept by the clerk of the Supreme Court. The names of those attorneys who are known to have died, or removed from the State, are omitted. The list is probably quite imperfect, owing to the fact, that gentlemen who are admitted to that court very often neglect to hand the clerk their names in order that he may properly enter them on the roll. If the members thus omitted will see to it that their names are properly enrolled by the clerk, the reporter, in a subsequent volume, will publish the corrected list.

If the members of the bar of the Supreme Court, throughout the State, will furnish the reporter with their names, and places of residence, he will, in Twentieth Indiana, in order to facilitate their intercourse with each other, publish their names and residences in full.

RULES OF THE SUPREME COURT,

ADOPTED NOVEMBER TERM, 1846.

MOTIONS

1. MOTIONS may be made immediately after the orders of the preceding day are read, and the opinions of the Court of the current day are delivered; but at no other time, unless in cases of necessity, or in relation to a cause when called in course.
2. Motions are to be made by the counsel in the order in which their names stand on the record; but no one is to make more than one motion at a time.
3. When a motion is founded on a matter of fact, which is not admitted, or apparent on the record, it must be supported by affidavit.

REHEARINGS.

4. Rehearings must be applied for during the term in which the decision is made, and by petition in writing, setting forth the causes for which the judgment or decree is supposed to be erroneous. The Court will consider the petition without oral argument, and direct the rehearing, if granted, to one or more points, as the case may require.

BRIEFS—ARGUMENTS.

5. When a cause, whether at law or chancery, is submitted without argument, each party must furnish the Court with a written statement of the points relied on, signed by counsel; but when the cause is to be orally argued, such statement must be submitted to the Court at a convenient time before the calling of the cause.

This rule is materially modified by Rule 41. *Quod vide.*

xviii RULES OF THE SUPREME COURT.

6. In every cause brought before the Court for trial, one of the counsel for the plaintiff must open the case, who may be answered by the counsel for the defendant, and the latter may be replied to by one of the plaintiff's counsel; and this shall end all discussion.

7. But two counsel will be allowed to argue on one side of any cause without leave of the Court, and such leave will only be granted in cases of importance and difficulty.

8. On motions and collateral questions, but one counsel will be heard on either side without leave of the Court.

OBJECTIONS TO EXHIBITS.

9. In original cases in chancery all extrinsic objections to depositions or other exhibits must be made before the final hearing of the cause.

WITHDRAWAL OF FILES.

10. The clerk of this Court shall not permit the papers in any cause to be taken from his office, or from the Court-room, except by the judges.

ASSIGNMENT OF ERRORS.

11. In appeals, the same rules shall be observed, with respect to the assignment of errors, as in writs of error. See Rule 20.

SUPERSEDEAS.

12. *Supersedeas* bonds may be executed in the clerk's office of the Court below, with surety, to be approved by such clerk, in a sum sufficient to include the judgment, damages, and costs. If a certified copy of the bond be presented to the clerk of this Court on application for a *supersedeas*, or for a writ of error to operate as such, the same may be issued in the usual form. The writ may, also, issue, though such copy be not presented. In that case the clerk shall indorse on the *supersedeas*, or on the writ of error indorsed to operate as a *supersedeas*, that it shall not stay the proceedings until the bond be executed as aforesaid, and an indorsement be made by the clerk below on the *supersedeas*, or on the writ of error, that the bond has been executed and approved as aforesaid. And a certified copy of the bond shall be filed in the clerk's office of this Court, on or before the first day of the term next ensuing the granting of the writ.

TRANSCRIPTS, WITHDRAWAL OF.

13. The clerk, during the term, may deliver the transcript of a cause to the counsel of either party, on being furnished with a receipt for the same. The transcript to be returned to the office within two days, or sooner if required.

This rule is rescinded by Rule 38. *Quod vide.*

14. All transcripts must be delivered to the clerk at his office, and the causes be there docketed.

APPLICATIONS FOR SUPERSEDEAS.

15. Applications for writs of *supersedeas*, in term time, must be made by delivering the transcript and briefs to the clerk at his office. And the clerk must deliver such transcripts and briefs to the judges at their chambers on the evening of the day on which he receives them.

DISMISSAL OF CAUSES.

16. When a cause in error is called, which has been docketed more than ninety days before the term, and there is no appearance for the defendant, (process not having been served ten days, nor taken out sixty days before the term,) the suit shall be dismissed.

17. If a cause be docketed on or before the first day of the term, and if in error the process have been issued ten days before the term, the parties must be ready when the cause is called. See Rule 19.

MOTION FOR CERTIORARI.

18. No motion for a *certiorari*, in cases of diminution of record, will be heard, unless the motion be made in writing, and state the defects to be supplied.

CALLING OF CAUSE—DISMISSAL.

19. If, when a cause is called, the plaintiff fail to appear, the defendant may have the cause dismissed, or may submit it, either with or without argument. If the defendant make default, the plaintiff may proceed *ex parte*.

NAMES OF PARTIES—PROCESS.

20. The assignments of errors shall contain the names of the parties, and process, when necessary, shall issue accordingly.

ORDER OF DECISION.

21. The causes shall be decided by the Supreme Court in the order of time in which they have been, or shall be, submitted, cases of emergency excepted; but, (Rule 23,) this rule shall not apply to plain cases.

APPEARANCES.

22. Appearances to suits in this Court shall be entered in the clerk's office.

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RULES ADOPTED NOVEMBER TERM, 1852.**ADMISSION TO THE BAR.**

24. Applicants for admission to the bar will be sworn as attorneys upon proof that they are voters, and of good moral character.

SUBMISSION ON BRIEFS.

25. No submission of a case will be permitted without a brief by the party submitting it; and, after the present term, only printed briefs will be received.

This rule is superseded by Rule 41. *Quod vide.*

REFERENCES TO RECORD.

26. The pages, and lines upon the pages, of transcripts, must be numbered before the cause is submitted, and the transcript must be referred to in the briefs by page and line.

INTERCHANGE OF BRIEFS.

27. Attorneys, upon opposite sides, in each case, will be required, upon request, to interchange briefs.

WAIVER OF POINTS.

28. Points not made in some of the briefs by counsel will be considered as waived in the suit in which the briefs are filed, and may be treated by the Court accordingly.

CITATION OF AUTHORITIES IN BRIEFS.

29. The volume containing any case cited in a brief must be placed within the reach of the Court; or the opinion in the case, or such part of it as is relied on, must be accurately copied, with the statement of the facts upon which it is based, and so much of the context as forms a qualification of, or exception to it.

BILL OF EXCEPTIONS CONTAINING EVIDENCE.

30. In every bill of exceptions, purporting to set out the evidence, upon motion for a new trial overruled, the words "this was all the evidence given in the cause," are to be regarded as technical, and indispensable to repel the presumption of other evidence, and this rule shall operate on all causes tried in the Circuit Courts and Courts of Common Pleas, after June 1, 1853.

RULES ADOPTED NOVEMBER TERM, 1853.

SUBMISSION—BRIEFS.

31. Causes may be submitted, without a brief, during the sitting of the Court, at the Supreme Court room, in the State-house; but every such submission will be set aside, at the costs of the party making it, where a printed brief is not filed in the cause, by the submitting party, within sixty days from the date of submission.

This rule is superseded by Rule 41. *Quod vide.*

32. Prosecuting attorneys will not be required to file printed briefs in cases wherin they appear as such for the defendant.

RULES ADOPTED NOVEMBER TERM 1854.

DISMISSAL FOR WANT OF BRIEF.

33. All cases submitted under the rule giving leave to file a brief in sixty days, shall stand dismissed; if the brief is not filed with the clerk within that time.

DISMISSED FOR FAILURE TO SUBMIT.

34. On the call of the docket, at each term, every cause, filed one year prior to the first day of such term, and not submitted, shall be dismissed at the cost of the party bringing the case up, unless, upon such call, the cause be submitted on printed brief.

This rule is superseded by Rule 41. *Quod vide.*

SUBMISSION—FILING BRIEFS.

35. The thirty-first rule, allowing causes to be submitted with leave to file briefs in sixty days, is hereby modified so as to apply only to causes filed within thirty days before the first day of the term; and all causes filed more than thirty days before the first day of the term, can be submitted only on printed briefs, filed at the time of submission, under the twenty-fifth rule.

This rule, also, is superseded by Rule 41. *Quod vide.*

36. Causes submitted under the sixty-day rule shall not be distributed to the judges till after the sixty days expire. See Rule 41.

AFTER SUBMISSION.

37. After submission the papers shall not be permitted to pass out of the hands of the judge to whom they are allotted; but either party may have a copy of the record, or any part of it, from the clerk, upon the payment of proper fees.

CUSTODY OF RECORDS, ETC.

38. The thirteenth rule is hereby rescinded, and the clerk is directed to keep the records, and to permit inspection of them in his office, or, on payment of proper fees, to furnish copies.

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RULES ADOPTED MAY TERM, 1855.**BRIEFS—ARGUMENTS.**

39. Written briefs may be filed, and oral arguments made in causes in the Supreme Court; but no such brief will be received, except in

open Court, at the time the cause is submitted; nor will oral argument be heard, except at that time, unless the Court may desire to hear such argument afterward. Causes may, however, be submitted by consent of parties at any time, on printed brief, by the submitting party, before the clerk of said Court. See Rule 41.

40. Printed briefs may be filed at any time before the cause is decided.

RULE ADOPTED NOVEMBER TERM, 1858.

SUBMISSION—BRIEFS—CLERK.

41. All causes pending in the Supreme Court, if submitted within one year from the date at which they are filed, may be so submitted upon plainly-written or printed briefs. If not submitted within one year from the date of filing, except where interlocutory orders may excuse the delay, they will be dismissed on the call of the docket, unless submitted on printed brief. Causes may be submitted within a year from the date of filing, without brief, and in such cases, a plainly-written or printed brief may be filed with the clerk, at any time within sixty days after the day of submission. In all cases, the clerk shall note the filing of a brief, the party by whom it is filed, and place it in the record. At the expiration of the sixty days, the clerk shall distribute to the judges the records of those causes in which a brief has been filed by a party who has assigned errors. Those causes in which no brief has been filed by such a party, shall also then be distributed in separate bundles, and shall be dismissed after the expiration of said sixty days from submission. The records in criminal cases shall be distributed to the judges, by the clerk, as soon as conveniently can be done after submission.

RULE ADOPTED NOVEMBER TERM, 1860.

CLERK'S DUTIES.

42. The clerk shall enter upon the Court docket, in a proper column, the fact, where such is the case, that the appeal was taken in term time, and duly perfected by filing the record within the time limited. Where the appeal is not taken as above, the clerk shall note the date of service of process, or last publication of notice. If process has not been served, or notice given, that fact shall be noted.

RULE ADOPTED NOVEMBER TERM, 1861.

OPINIONS, WHEN CERTIFIED TO LOWER COURTS, ETC.

43. Opinions and judgments pronounced by this Court, shall not be certified to the lower Court, by the clerk of this Court, to be there operative under section 571, 2 R. S., 1852, unless by order of this Court, until the expiration of sixty days; and the clerk is directed to certify a copy of this order to the lower Court in any instance where copies of the opinions, etc., have been sent down, within the time, without such order of the Court.

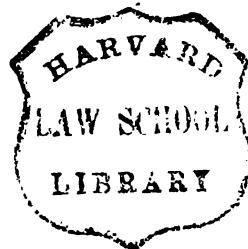


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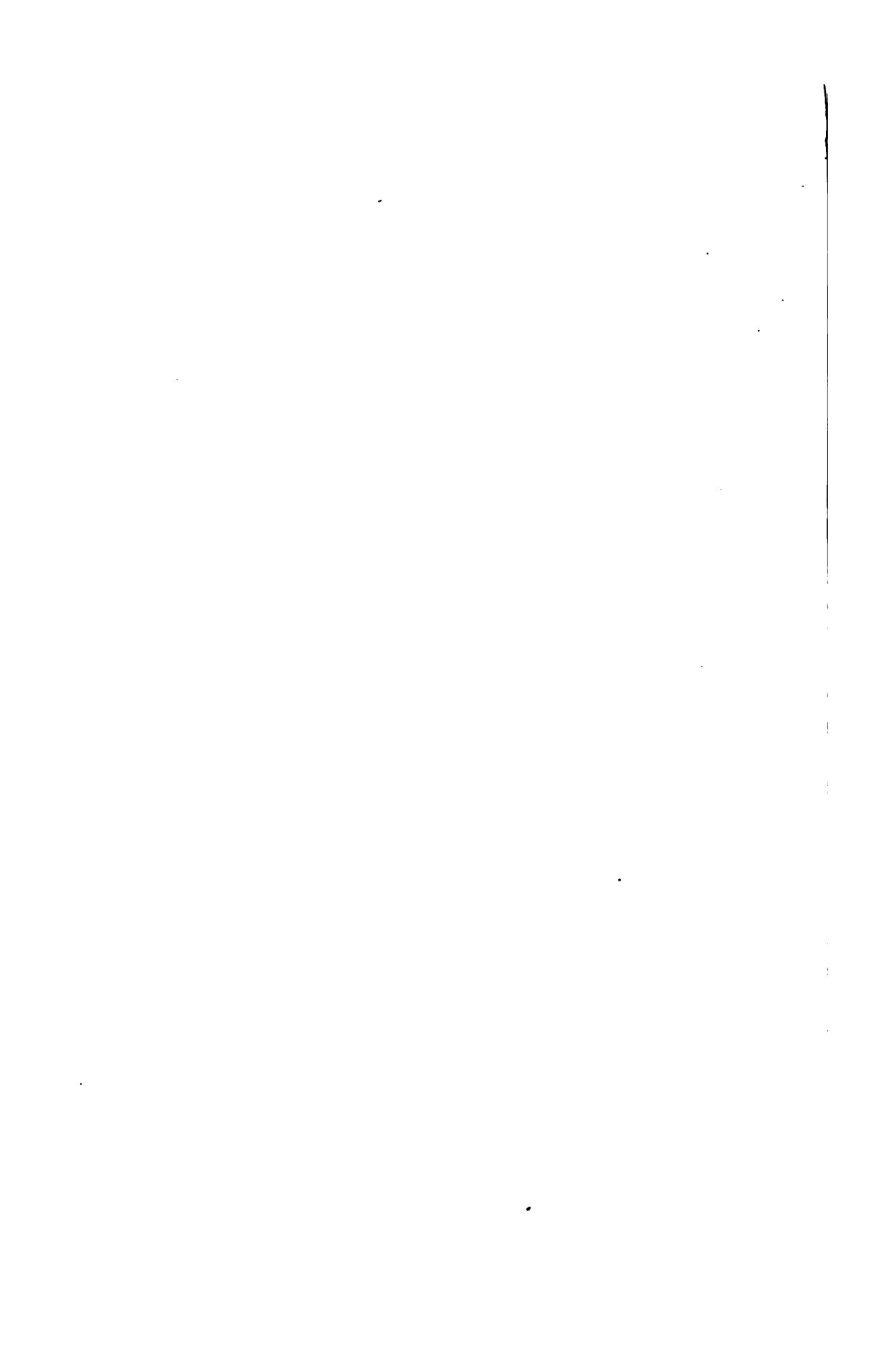
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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, NOVEMBER TERM, 1862, IN THE
FORTY-SIXTH YEAR OF THE STATE.

WEST and Another *v.* COOPER.

Where a sheriff, having an execution in his hands, demands personal property of the execution defendant, and he surrenders two notes, and afterward requests that they be given back to him, and surrenders no other property, and the sheriff then levies the execution upon and sells real estate, and on a trial to set aside such sale, it does not appear what was done with said notes, nor what was their value, this Court will presume that they were returned to the defendant, and that he failed or refused to surrender other personal property, and that said sale was, in this respect, regular.

It is clearly the duty of the sheriff to determine whether real estate, sold by him, is susceptible of division, so as to be sold in parcels without injury to the parties; and if he decide wrongfully, and sell an entire tract, which might have been sold in parcels without injury, and a part of which might have been sold for sufficient to pay the debt, he may be liable on his bond for the injury.

But where the sheriff sells an entire town lot, and neither the execution defendant, nor any other person interested in the property, suggests that it is susceptible of division, or demands that it be sold in parcels, the purchaser's title will be valid, although it may be afterward found by a jury that the property was susceptible of division.

West and Another v. Cooper.

APPEAL from the *Hancock* Circuit Court.

WORDEN, J.—This was an action by *Berry W. Cooper* against *West* and *Pierson*, to set aside a certain sheriff's sale and conveyance.

The following facts may be gathered from the pleadings and special findings, viz.: One *Henry Babcock* recovered a judgment in the Court of Common Pleas of *Hancock* county against *Robert D. Cooper*, for \$67.32, and costs, on which execution was issued and levied upon lot number 4, in block number 1, in the town of *Greenfield*, in said county. On a *venditioni exponas*, afterward issued upon the judgment, the lot was sold and conveyed by the sheriff to the defendant *West*, for the sum of forty dollars. *West* afterward sold and conveyed the lot to the defendant *Pierson*. After the recovery of the judgment, and the levy upon the lot, *Robert D. Cooper* sold and conveyed the lot to the plaintiff, *Berry W. Cooper*.

There appear to be two grounds alleged in the complaint for setting aside the sale thus made. *First*. That the judgment defendant, *Robert D. Cooper*, had personal property which he was willing to turn out, sufficient to satisfy all that was due on the judgment, but was not called upon to do so; and *Second*. That said lot was susceptible of division without injury, and that a part thereof could have been sold for sufficient to satisfy the judgment.

There was a trial of the cause by a jury, who found no general verdict, but returned answers to interrogatories propounded to them. If these answers to interrogatories can be regarded as equivalent to a *special verdict*, and therefore good without a general verdict, (a question which we need not decide,) then the question arises, whether the facts thus found entitle the plaintiff to a judgment. On the finding thus returned the Court rendered judgment for the plaintiff, setting aside the sheriff's sale and conveyance. Exceptions were taken so as to properly present the question here.

West and Another v. Cooper.

The jury say, among other things, that the lot was purchased by *West* in good faith, and not in fraud of the rights of the plaintiff.

The following interrogatories and answers thereto are also returned:

“5th. Did the sheriff, or his deputy, during the time said execution was in his hands, demand of *Robert D. Cooper* personal or other property on said execution?

“Ans. The deputy sheriff did demand of *R. D. Cooper* personal property during the time said execution was in his hands.”

“6th. If such demand was made, did *Robert D. Cooper* surrender and direct the levy to be made on personal property; and if so, on what personal property?

“Ans. He did surrender two notes, without any special directions.”

“7th. If you should find that *Robert D. Cooper* refused to give up, on such demand, personal property, then find what directions, if any, were given by *R. D. Cooper* with reference to levying upon real property.

“Ans. He did refuse to give up other than the two notes, and, on conditions, requested those notes given back, with no directions in reference to other property.”

These findings of the jury, in our opinion, dispose of the first ground on which the sale is sought to be set aside. It appears that *R. D. Cooper* refused to turn out property when demanded, except the two notes, which he requested to have given back to him; and the inference may, perhaps, be fairly drawn, that the notes were returned to him, but if not, it does not appear what was the amount or value of the notes. They may, for aught that appears in the findings, have been very small, and wholly insufficient to discharge the amount due on the execution. It does not appear but that the levy was properly made on the lot in question.

West and Another v. Cooper.

We come now to the important question in the case, arising upon the following interrogatories and answers:

“9th. Was the property, sold by the sheriff as the property of *R. D. Cooper*, susceptible of division?

“Ans. It was susceptible of division.”

“10th. Was the property susceptible of division without material injury?

“Ans. It was.”

“11th. Was there any more or greater portion of said property sold than was necessary to satisfy the amount of principal, interest, and cost due on the execution?

“Ans. There was more property sold than was necessary to satisfy said execution, with interest and cost on the same.”

“12th. If you find, from the evidence, that there was a greater portion of said real property sold by the sheriff than was necessary to satisfy said execution, state what portion would have been sufficient.

“Ans. The west half of said realty would have been sufficient to satisfy said execution.”

The statute provides that “if the estate shall consist of several lots, tracts, and parcels, each shall be offered separately; and no more of any real estate shall be offered for sale than shall be necessary to satisfy the execution, unless the same is not susceptible of division.” 2 R. S. 1852, p. 141.

The case before us is that of a single town lot, which does not consist of several “lots, tracts, or parcels,” and if the same was not susceptible of division, the whole was properly sold. But whose duty was it, in the first instance, to judge whether the property was susceptible of division? Clearly that of the sheriff. If he judged wrongfully, and sold the entire lot when it might have been divided without injury, and a part of it sold for sufficient to satisfy the debt, he might be liable on his bond for the injury. *The State v. Leach*, 10 Ind. 309. But in a case like the present, where there is a sale of a single town lot, and where neither the

Abdill and Others v. Hamilton.

execution defendant, nor any one interested in the property, has made any suggestion that the property was susceptible of division, or demanded that it be offered in parcels, we think the purchaser's title is valid, although it may be afterwards found by a jury that the property was susceptible of division.

The purchaser may well presume that the sheriff has properly discharged his duty, and we think it not within the spirit or policy of the law to make the title of a purchaser in such case depend upon the subsequent finding of a jury as to the divisibility of the property.

On the findings the plaintiff was not entitled to judgment.

Per Curiam.—The judgment below is reversed, with costs, and the cause remanded.

W. R. West and Henry Craven, for the appellants.

R. D. Walpole, for the appellee.

•••

ABDILL and Others v. HAMILTON.

Where real estate is sold on credit, and bond is given for title, upon the payment by the purchaser of certain notes, and said notes have all become due and remain unpaid, the obligor in the bond should first tender a deed to the purchaser, and then sue upon all the notes unpaid, and not a part only.

APPEAL from the *Fountain* Circuit Court.

Per Curiam. *John Hamilton* executed to *Abdill and McCampbell* a title bond, dated October, 1859, and conditioned that he should execute to them a deed for a tract of land, on their payment to him of three promissory notes, one for six hundred and fifty dollars, due January 1st, 1860; one for three hundred and twenty-five dollars, due July 1st, 1860; one for a like sum, due January 1st, 1861.

Abdill and Others v. Hamilton.

All of the first note has been paid but one hundred and fifty dollars, for which sum another note, on three years time, was taken, as stated below.

All of the second note has been paid.

This suit was commenced in March, 1861, upon the last note.

No deed had been tendered before suit.

The Court below gave judgment for the plaintiff.

The Court did this on the ground that an extension of time had been given on the one hundred and fifty dollars balance due on the first note, till 1864; and upon the reasoning that such extension also had the effect to extend the time of performance of the condition of the bond without any agreement to that effect. This may be doubtful; but it is not material that we should decide the point now, as the Court was wrong upon its assumption of fact. The time assumed to have been given on the one hundred and fifty dollars of the first note was not, in fact, given. It was only conditionally given. No alteration was made in the terms of the six hundred and fifty dollar note. It was not given up as cancelled, upon receiving the new conditional note given for the balance due on it; but *Hamilton* agreed with *Abdill and McCampbell* that if they would, in a reasonable time, do a certain thing, time should be given, and the note for the six hundred and fifty dollars, on which the one hundred and fifty dollars balance was unpaid, should be given up. They did not do that thing. They did not accept and comply with the condition. The balance of the six hundred and fifty dollar note remained due; the new conditional note for the one hundred and fifty dollars never became absolute, but became void, and the note sued on still stood as the last one for the purchase money.

Hamilton should have tendered a deed, and then included in the single suit both notes remaining unpaid. The law abhors multiplicity of suits.

Lord and Others v. Fisher and Others.

This disposes of the case, and other questions need not be examined.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

J. N. Evans, for the appellant.

19	7
195	64
196	384
197	301
197	510
19	7
146	552

LORD AND OTHERS v. FISHER AND OTHERS.

The transfer of a part or all of his property, either directly, or by way of confession of a judgment and levy of an execution, by a debtor in failing circumstances, for the purpose of paying one debt, leaving many others unpaid or unsecured, if done in good faith, unaffected with any secret trust, is valid, although done in contemplation, and but a few days before the execution, of a general assignment by the debtor.

The fact that the creditor had notice of the debtor's intention to make an assignment, would not render fraudulent a conveyance or lien obtained by him simply for the purpose of securing an honest debt.

The voluntary assignment law of 1859 has no retroactive effect.

APPEAL from the Franklin Common Pleas.

PERKINS, J.—*Doughty and Snyder* were indebted to *Samuel Fisher* in a sum exceeding one thousand dollars. They were in failing circumstances, and contemplated making an assignment. *Fisher* knew these facts. He called on *Doughty and Snyder*, and an arrangement was made and executed whereby they confessed several judgments before a justice of the peace, amounting, in the aggregate, to their debt to *Fisher*, on which judgments executions were issued, and levied upon the personal property of *Doughty and Snyder*.

“A few days afterward,” how many, is not exactly stated,

Lord and Others v. Fisher and Others.

Doughty and Fisher made an assignment of all their property to *James D. Henry*, in trust, to pay their debts.

Subsequently, *Henry* applied to the Common Pleas for leave to pay off the execution of *Fisher*, and thus discharge the property from liens, and the leave was granted.

Thereupon the other creditors of *Doughty and Snyder*, who, in the mean time, had recovered judgments on their demands, filed a complaint for an injunction restraining the trustee from paying off *Fisher's* execution, and praying that he should receive pay upon them only in a *pro rata* distribution, to be made by the trustee among all the creditors.

The complainant did not charge that the arrangement between *Doughty and Snyder* and *Fisher*, whereby the property was subjected to the executions, was entered into with any fraudulent intention on the part of any one, but simply recited the facts above stated.

The Court dismissed the complaint, or demurrer, as not showing a cause of action—a ground for equitable relief. And whether it did show such, is the only question this Court has to decide. If the lien of the executions was a valid one, the complaint was groundless; if it was invalid, the complaint made a case for relief.

Was the lien valid? If not, why not?

Naturally, a man has a right to make an honest disposition of his property; that is to say, he may use it to pay any honest debt. It may not be an honest disposition of property to sell it upon a new, and even adequate consideration, if the sale is to keep the property from creditors. It is an honest disposition of a man's property to use it in paying or securing an honest debt. It is a dishonest use of it to pretend to convey it to pay or secure a debt, when, in fact, it is conveyed to be held upon a secret trust for the benefit of the grantor. It is not, in the eyes of the law, necessarily a dishonest use of a man's property to convey all he has to pay or secure one debt while he leaves

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many others unpaid, or unsecured. *Chandler v. Caldwell*, 17 Ind. 256. In the case at bar, it is not pretended but that the debt of *Doughty and Snyder* to *Fisher* was an honest one; nor is it pretended but that the judgments were confessed according to law, and the executions levied upon the property for the *bona fide* purpose of appropriating it to pay the executions, rather than to be held for the use of *Doughty and Snyder*. Nor is it denied that the law holds it commendable in a creditor to be diligent in his collections; and it seems that such diligence is all that *Fisher* has been guilty of. Why, then, is he to be deprived of the benefit of the security which his diligence on the one hand, and the free-will of *Doughty and Snyder* on the other, have given him? It is said that *Doughty and Snyder* suffered the lien to be created "a few days" before they made their assignment. But the assignment was voluntary, and they had a right to fix upon their own time to make it, if they concluded to make it at all. And up to the very time they did make it, their property remained at their own disposal; and, *prima facie*, all disposition of it made by them before the assignment, in paying or securing honest debts, are valid. This is so, unless the statute regulating assignments prescribes differently. It does not. It has no retroactive effect. It provides, it is true, in substance, in section 15, that the assignment shall carry property that had been fraudulently conveyed; but this is only giving effect to the provision that the assignment shall embrace all the assignee's property; because the fraud vitiates the title and leaves the property thus conveyed equitably in the assignor—really his property. 1 G. & H., p. 117. And, we may remark, that the reverse fact that *Fisher* knew that *Doughty and Snyder* contemplated making an assignment, did not render a conveyance or lien obtained by him, simply for the purpose of securing an honest debt, fraudulent. See *Burr on Ass.*, p. 449; *Ingraham on In-*

Snowden and Others v. Wilas and Others.

solvency, *passim*. Our assignment law is not a bankrupt law. The assignment law provides for a voluntary disposition of property, and has no retroactive operation. The English bankrupt law provides for involuntary transfer of property, defines what acts, called acts of bankruptcy, shall subject a debtor to such compulsory transfer of his property, and declares that the transfer shall relate back to the act of bankruptcy occasioning it, and, as a general proposition, divest titles and liens accruing after that act. Such are the provisions of the statute. 2 Black Comm., pp. 477, 486; 4 *Id.* 146.

Per Curiam.—The judgment below is affirmed, with costs.

Wilson Morrow, George Holland, and Charles C. Binckley, for the appellants.

Nelson Trusler, Thomas B. Adams, and Fielding Berry, for the appellees.

19	10
127	68
19	10
128	68
19	10
133	164
19	10
135	48
135	108
19	10
146	253
19	10
150	70
19	10
161	120
19	10
166	157
19	10
169	324
170	122

SNOWDEN and Others v. WILAS and Others.

Uncertainty may be the ground of a motion to compel a party to make his pleading more certain, but not a ground of demurrer, unless the pleading be so uncertain as not to state intelligibly a substantially good cause of action or defense.

A license to enter upon and occupy land for any purpose must be specially pleaded, both at common law and under the code, or the same can not be given in evidence without consent, and such consent will not be presumed.

The right in one to overflow the land of another is an easement, and it is an interest in real estate, and title to such easement must be conveyed by grant, and established by proof of actual grant, or of prescription, from which a grant will be inferred.

If a license to do an act upon the land of another do not involve an

Snowden and Others *v.* Wilas and Others.

interest in real estate, or necessarily amount to an easement, it may be given by parol, and if coupled with an interest, ~~say~~ if it be ^{especially} upon a consideration, it can not be revoked.

In equity, the future enjoyment of an executed parol license, granted upon a consideration, or upon the faith of which money has been expended, will be enforced, at least, where adequate compensation in damages could not be obtained.

And in such cases, grantees as well as the original parties, are bound, where they purchase with notice, and in the case of a mill-dam, the existing condition of things might be notice to them of the equity.

Quere. Whether the present statute on the subject of assessment of damages for property taken or injured for public use, (which includes public works and mill-dams,) does not limit the mode of redress for injury done by the erection of a mill-dam to that provided in the statute?

APPEAL from the *Huntington* Circuit Court.

PERKINS, J.—This was a suit by *Wilas and Others* against *Snowden and Others*, to recover for damage done by overflowing land by means of a mill-dam.

The defendants demurred to the complaint for uncertainty. The demurrer was overruled.

Uncertainty is not a ground of demurrer under the code; but is a ground for a motion to compel the plaintiff to make his pleading more certain. Nevertheless, if a pleading be so uncertain as not to state intelligibly a substantially good cause of action or defense, it will be subject to demurrer, for not stating a cause of action or defense.

In the case at bar, we think the complaint was subject to a motion for uncertainty, in not describing with sufficient particularity the given piece of land overflowed, but that it was not so uncertain as to be subject to a demurrer for not stating intelligibly a cause of action.

On the overruling of the demurrer, the defendants answered.

Snowden and Others v. Wilas and Others.

The answer contained the general denial, and a special paragraph as follows:

The defendants admit the erection of the dam, etc., but say that it was erected by *Daniel Frenderburg*, in connection with a flouring-mill, the two costing thirteen thousand dollars; that before said *Frenderburg* erected the dam and mill, he applied to *Moses Wilas*, the then owner of the land overflowed, the land now owned by the plaintiffs, for license to erect said mill and dam; that *Wilas* gave the license by parol, and upon the consideration of fifty dollars in cash paid, and the fact that the mill would be an advantage to him, as well as to the whole neighborhood in which he lived; that the hight of the dam was specified, being the exact hight of that built and maintained; that since the dam and mill had been erected, *Frenderburg* had sold and conveyed the same to the defendants; and the plaintiffs had obtained title from *Wilas* to the land overflowed.

The defendants prayed that their right to maintain the dam at its present hight might be established, etc.

The Court sustained a demurrer on this paragraph of the answer; the cause was tried upon the general denial, and the plaintiffs obtained judgment for a portion over seventy dollars.

It is insisted by the appellees, that this Court should not examine the question arising upon the ruling of the Court below in sustaining the demurrer, because, they say, the entire merits of the action may have been tried upon the general denial; but in this they are mistaken. Leave and license must, under the code, as well as common law, be specially pleaded, to be admissible in evidence, unless by consent. Consent will not be presumed, in the absence of all facts tending to show it. See 7 Blackf. 108, 373.

We come, then, to the question, Did the special paragraph of the answer contain facts constituting a bar to the action?

The right in one to overflow the land of another is an

Snowden and Others v. Wilas and Others.

easement, an incorporeal hereditament, and it is an interest in real estate. Title to such easement is conveyed by grant, and established by proof of an actual grant, or by proof of prescription, from which a grant will be inferred. And if the mode of proof adopted be the showing of an actual grant, the grant must, at least, under the statute of frauds, be in writing, be by deed. This is the general rule in Courts of law. *Moore v. Sinks*, 2 Ind. 257. *Bell v. Elliott*, 5 Blackf. 113. See 8 Ind. 104, 387.

License, it may here be observed, to do an act upon the land of another, does not necessarily involve an interest in real estate, does not necessarily amount to an easement, and, when it does not, it may be given by parol, and if coupled with an interest, especially if it be upon a consideration, it can not be revoked. If one gives another license to go upon his land to shoot a single squirrel then existing and pointed out, that does not create an easement, and may be given by parol; and if the license go further, and include the right to take away, as the property of the licensee, the squirrel when shot, it is coupled with an interest; and, if given upon a consideration, at all events, it can not be, at mere volition, revoked. But the right, in perpetuity, to one to hunt game upon a given tract of land of another, would be an easement, would involve an interest in real estate, and might be revocable, under certain circumstances, if not under all, if given by parol. And further, it may be remarked, licenses, whether revocable or not, excuse the licensee while acting under them, before revocation, and protect him from suits for acts done within the license. *Bell v. Elliott, supra*. *Miller v. The Auburn, etc. Co.*, 6 Hill (N. Y.) Rep. 61. *Pierrpont v. Barnard*, 2 Selden Rep. 279. Licenses can not be revoked as to acts performed under them. The revocation is prospective, not retrospective. *Wallis v. Harrison*, 4 M. & W. 538.

Parol revocable licenses, it seems, also, are personal, can

Snowden and Others *v.* Wilas and Others.

not be assigned, and are determined without notice to the licensee, by a conveyance of the property upon which they are to be executed. *Ruffy v. Henderson*, 8 Eng. L. & E. Rep. 305. 2 Am. L. Cas. 680. *Gronendyke v. Cramer*, 2 Ind. 382. Such are the principles which govern in Courts of law.

But though a parol license, amounting in terms to an easement, is revocable, as to future enjoyment, at law, and is determined by a conveyance of the estate upon which it was to be enjoyed, this is not the rule, in all cases, in Courts of equity. In these Courts, the future enjoyment of an executed parol license, granted upon a consideration, or upon the faith of which money has been expended, will be enforced, at all events, where adequate compensation in damages could not be obtained. This will be done upon the two grounds of estoppel on account of fraud, and specific performance of a partly executed contract to prevent fraud. And in those States of the Union where law and equity are administered in the same Court, relief is afforded in any given suit where the pleadings present the necessary averments. And grantees, as well as the original parties, are bound, where they purchase with notice, and in a mill and dam, the existing condition of things might be notice to them of the equity. *Foster v. Browning*, 4 R. I. Rep. 47. *Long v. Arnett*, 33 Penn. St. Rep. 169. *McKellip v. McWheny*, 4 Watts, 317. *Herick v. Kerr*, 2 Am. Leading Cases, 676. Ang. on Wat. 359. Browne on the Statute of Frauds, p. 32. 3 Kent Comm. 452, *et seq.* See *Kepley v. Taylor*, 1 Blackf. by P. & D. 412. Within these authorities, the second paragraph of the answer in this cause was good.

Another question we suggest, but do not decide.

When statutes authorize land to be taken for public use, as for railroads and canals, etc., and provide a form of remedy, that form must be adopted by the injured party. *The Lafayette, etc., Co. v. The New Albany, etc., Co.*, 13 Ind. 90.

Hutchins v. Barnett's Executor.

The taking of property for mill-dams is taking it for public use. *Hawkins v. Lawrence*, 8 Blackf. 266.

The present statute of Indiana on the subject of assessment of damages for property taken or injured for public use, includes public works and mill-dams, and gives to the party injured, against the party taking or injuring, the right of redress in the mode prescribed by the statute. 2 G. & H. p. 312, Subdiv. Ninth; p. 316, Sec. 710. Why, then, is not a person, whose land is injured by a mill-dam, not limited to the statutory mode of redress?

Per Curiam.—The judgment below is reversed, with costs; cause remanded for further action of the Court below.

D. O. Daily and *L. P. Milligan*, for the appellants.

John R. Coffroth, for the appellees.

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HUTCHINS v. BARNETT's Executor.

The appraisement law in force at the date of a judgment will govern sales on execution to satisfy it, when the contract upon which the judgment was rendered was executed and to be performed without the State, because our appraisement law could not, in such case, enter into and constitute a part of such contract.

In an action to set aside a sale on execution, issued on such judgment, instituted before the delivery of a deed by the sheriff to the purchaser, and before the payment of the purchase money, it is competent to show by testimony where such contract was executed and payable.

APPEAL from the *Allen* Circuit Court.

DAVISON, J.—This was a proceeding by notice and motion to set aside certain levies and sales of real estate, upon the ground "that the sales were made without appraisement." The motion was made by *Hanna*, as executor of *James Bar-*

Hutchins v. Barnett's Executor.

nett, deceased, against *Hutchins*, the execution plaintiff, was sustained by the Court, and judgment was accordingly rendered. The facts alleged and proved, so far as they relate to the point in controversy in this Court, are as follow: Prior to the October term, 1841, *Hutchins* instituted an action upon two promissory notes, in the *Allen* Circuit Court, against *Joseph Scott, John Iten, and Francis Comparet*, partners, etc., under the name of "*Scott, Iten & Co.*" The notes read thus:

"\$388. New York, August 12, 1840. Eight months after date, we promise to pay to the order of *George H. Hutchins* three hundred and thirty-eight dollars, at New York city, in city funds, for value received. SCOTT, ITEN & Co."

"\$538. New York, August 12, 1840. Six months after date, we promise to pay to the order of *George H. Hutchins* five hundred and thirty-eight dollars, at the *Br. at Fort Wayne* of the State Bank, Indiana, with current rate of exchange in New York, for value received.

"SCOTT, ITEN & Co."

The complaint upon these notes, in its description of them, alleges, under a *videlicet*, that they were made in the County of *Allen*, and State of *Indiana*. On the 13th of October, 1841, being the ninth judicial day of said term, the parties appeared; but the defendants said nothing in bar or preclusion, and the Court thereupon assessed the plaintiff's damages at eight hundred and ninety-nine dollars, and for that sum rendered a judgment, etc. And on the 8th of December, then next following, *James Barnett*, then in life, but now deceased, became replevin bail on the judgment.

On the 8th of July, 1844, a writ of *fieri facias* was issued on said judgment against the principal defendants and *Barnett*, the replevin bail, and levied on nine lots, "set out by their numbers," in *Hanna's* addition to *Fort Wayne*, as the property of *Francis Comparet*. These lots were afterward, upon a *venditioni exponas*, sold for fifty dollars. After this, in March, 1847, an *alias* writ of *fieri facias* issued, and was

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levied upon the one undivided third of thirty-seven acres, situate in *Allen* county, as the property of *Scott*, also upon the center third of lot No. 57, in the city of *Fort Wayne*, as the property of *Iten*, and also upon lot No. 104, in that city, and the west half of the north-west quarter of section 14, township 30, range 12, in said county, as the property of *Barnett*. On the 24th of May, next ensuing the date of these levies, the aforesaid undivided interest in the thirty-seven acres, and the center third of lot 57, were sold by the sheriff, without appraisement. But said writ of *fieri facias*, as to *Barnett's* property, was returned "no sale for want of bidders." And on the 11th of September, 1850, a writ of *venditioni exponas* issued, upon which the property of *Barnett*, as above described, was offered for sale, without appraisement, and purchased by *Hanna*, in his own right, for twelve hundred and thirty dollars. *Barnett*, on the 29th of April, 1851, the day after his property was thus sold, notified *Hanna*, in writing, that he should proceed to have the sale set aside, as irregular and void. And *Hanna*, having refused to accept a deed, pursuant to his purchase, or pay the purchase money, the sale, as yet, remains incomplete.

The plaintiff, upon the trial, offered evidence tending to prove "that at the time said notes were executed, *Hutchins*, the payee thereof, was and still is a resident merchant in the city of *New York*, in the State of *New York*;" that "Scott, *Iten & Co.* were his customers, and the notes were given by them to him for goods sold by him to them, in said city of *New York*, and were there executed. And that the *New York* city mentioned in the note dated August 12, 1840, for three hundred and thirty-eight dollars, as the place where the same was payable in city funds, was the city of *New York*, in the State of *New York*." This evidence, though resisted by the defendant, was admitted by the Court, and the defendant excepted.

It is agreed by the parties, that the only question to be
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presented is: "Whether the Court erred in admitting evidence as to the place where the notes were executed and payable?"

The first appraisement law was approved February 12th, 1841. It required the sale to be at half the appraised value, and was in force when the judgment against "Scott, *Iten & Co.*" was rendered. But the notes upon which that judgment was founded were made in August, 1840, and the general rule is, that such laws are not operative as to prior contracts. Where, however, the contract involved in the judgment was executed, and was to be performed without the State, our law on the subject of appraisement could not enter into and constitute a part of such contract; and the result is, the appraisement law in force at the date of the judgment will govern the sale on execution. 1 Ind. 24; 8 *Id.* 533. Hence the inquiry: Whether, in this instance, the evidence was admissible? It is conceded, that anterior to the issuing of the execution, the question as to where the claim originated might have been tried and determined before the Court, in a proceeding instituted on motion, or by complaint, but insisted that a sale on execution having occurred, it was not competent by evidence to rebut the presumption that the notes were executed within this State. The position thus assumed, in its application to the case at bar, seems to be incorrect. If the sheriff's sale had been completed, so that under it the title to the estate sold and conveyed by the sheriff had become vested in an innocent purchaser, it may be, that as against such purchaser, the evidence would be inadmissible. But here the sheriff's vendee had simply bid off the property, had received no deed, nor had he paid the purchase money; and that being the case, it seems to us that, on motion to set aside the sale, it was competent to adduce evidence tending to prove that the sale was made in violation of the substantial requirements of the statute. Indeed, it has been often

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decided that "where the law, as applied to the contract, required an appraisement, a sale without it is void." 2 Blackf. 1-32. 1 Ind. 24. And, as in this instance, the offered evidence conduced to prove the sheriff's sale a nullity, it was, in our opinion, correctly admitted.

Per Curiam.—The judgment is affirmed, with costs.

John Morris, Wm. H. Combs, and John Hough, for the appellants.

R. Brackenridge, for the appellee.

HAYS v. GWIN.

The following instrument, under the act concerning promissory notes and bills of exchange, approved May 12, 1852, is not a promissory note:

"\$1141.56.

LAFAYETTE, IND., April 16, 1856.

"On or before the first of April, 1858, I promise to pay *Henry C. Ash*, or order, eleven hundred and forty-one dollars and fifty-six cents, for value received, and without any relief whatever from the appraisement laws, provided, however, that, prior to the time when this note becomes due, said *Ash* shall pay and have satisfaction entered, of record of a certain mortgage given to him by *Levi Reynolds*, for two hundred and fifty dollars, dated August 26, 1851, which mortgage is on the lands for which this note is given.

"SAMUEL SHENK."

That act makes no instruments promissory notes but those which were such at the common law, and, therefore, the holder of the foregoing instrument can not maintain an action thereon against an indorser or assignor.

APPEAL from the *White* Common Pleas.

DAVISON J.—Hays, as indorsee of a written instrument,

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sued *Gwin*, a remote indorser. The instrument sued on is alleged to be a promissory note, and is as follows:

“\$1141.56.

LAFAYETTE, IND., April 16, 1856.

“On or before the first of April, 1858, I promise to pay *Henry C. Ash*, or order, eleven hundred and forty-one dollars and fifty-six cents, for value received, and without any relief whatever from the appraisement laws, provided, however, that, prior to the time when this note becomes due, said *Ash* shall pay and have satisfaction entered, of record of a certain mortgage given by him to *Levi Reynolds*, for two hundred and fifty dollars, dated August 26, 1851, which mortgage is on the lands for which this note is given.

“SAMUEL SHENK.”

It is averred that *Ash*, the payee, assigned the instrument to *Gwin*, the defendant, who assigned it to one *Hays*, who assigned the same to the plaintiff, and that, after the instrument had matured, and payment and satisfaction of the mortgage to which it refers—the plaintiff sued *Shenk*, the maker, and recovered a judgment against him for only nine hundred and fifty-five dollars and eighty-one cents, and costs; and that, to the extent of the difference between that recovery and the nominal amount of the instrument, viz.: two hundred dollars, the same was procured by fraud, and was without consideration, wherefore, etc., defendant demurred to the complaint. His demurrer was sustained, and the plaintiff excepted. Final judgment was given for defendant.

In argument, two questions are presented: 1. Is the instrument, upon the assignment of which this suit is brought, a promissory note within the meaning of “An act concerning promissory notes and bills of exchange,” approved May the 12th, 1852? 2. If the instrument is not a promissory note within the meaning of the act, is that appellee—a remote assignor—liable to the appellant upon his assignment?

The act referred to declares “That all promissory notes,

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bills of exchange, or *other instruments of writing*, signed by any person who promises to pay money, or acknowledges money to be due, or for the delivery of any specific article, or to convey property, or perform any stipulation therein mentioned, shall be negotiable by indorsement thereon, so as to vest the property thereof in each indorsee successively;" that "the assignee of any such instrument may, in his own name, recover against the person who made the same," and that "any such assignee, having made due diligence in the premises, shall have his action against his immediate or remote indorser." 1 R. S. p. 378, sections 1, 2, and 4. These sections, so far as they relate to instruments other than "promissory notes and bills of exchange," have been adjudged inoperative, because the "other instruments" referred to in the body of the act, are not embraced in the title. *Mewherter v. Price*, 11 Ind. 199.

Is the instrument in question, in point of law, a promissory note? Mr. Story says: "To make a written promise a valid promissory note, it must be for a fixed and certain amount," and "must be payable absolutely, and at all events, and not be subject to any condition or contingency." Story on Prom. Notes, sections 20-22. This is the common law definition, and it will at once be seen that the instrument in question is not within its requirements. It is, however, insisted, that the definition of a promissory note, as it stood at common law, has been varied in this State by judicial decision; thus in *Nicholas v. Woodruff*, 8 Blackf. 493, it was held that "a promissory note, payable on a contingency, may, under the statute, be the foundation of an action brought by the payee or assignee, and the consideration for which such note was given need not be averred." This decision was, no doubt, correct, because the note then in suit was, by statute, made assignable by indorsement, and in other respects placed upon a footing with notes "payable absolutely, and at all events." R. S. 1843, pp. 576, 577. In

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Nicholas v. Woodruff, supra, the Court, in its opinion, says: "We consider the note before us to be within the statute. It is, to be sure, payable on a contingency; but as the statute makes no distinction between notes payable on a contingency and those payable at all events, it is not for us to make the distinction." Various other cases, similar to the one to which we have referred, are cited from our Reports; but they are all based upon statutes similar to that of 1843, and enunciate the same rule of decision. And had the statute of 1852 remained in form and effect as it was enacted, the instrument before us might, in reference to the purposes of this suit, be regarded a promissory note. But as that statute has been modified by judicial decision so as to embrace *only* promissory notes, as defined by the common law, no other written promises to pay can be held within its provisions. The instrument, it is true, is assignable without indorsement; but that being the case, the action is still not maintainable, because an assignor is not liable, unless there be a written indorsement, either in full or in blank. *French v. Turner*, 15 Ind. 59.

It may be noted that since the trial of the above cause in the Circuit Court, the act of 1852, concerning Bills and Notes, has been repealed, and a new law on that subject enacted. See Acts 1861, p. 145.

Per Curiam.—The judgment is affirmed, with costs.
H. W. Chase and J. A. Wilstach, for the appellant.

WILLETTS *v.* WILLETTS and Others.

Where advancements have been made by the father to his children in his lifetime, and he dies, his estate, out of which his widow shall be entitled to a distributive share under the statute, shall be what remains, exclusive of the sums advanced.

Willets *v.* Willets and Others.

APPEAL from *Wayne* Common Pleas.

HANNA, J.—*Jane Willets*, widow of *William Willets*, sued the administrator and children of said *William*, alleging that certain notes executed to said *William*, by said children, respectively, had come into the hands of said administrator, which he refused to collect, and pay to her her distributive share, etc.

Answer. 1. Denial. 2. That the sums, evidenced by the notes, were advancements. 3. Ante-nuptial contract.

Demurrer overruled. Reply in denial. Trial by the Court, and finding for the defendants.

It is urged that, under our statute, heirs must account for advancements; that in considering the same, a widow is entitled to her distributive share thereof. In other words, that the husband can not bestow his property, in his lifetime, as an advancement, in disregard of the inchoate right of the wife therein; and, therefore, the answer was insufficient. The simple question is: If *A* should die, leaving two children and a widow, and fifteen thousand dollars, whether that is the amount to be distributed; or whether other ten thousand dollars, that may have been advanced in equal sums to the children, shall also be taken into the account? If the former sum only, then there would be five thousand dollars for each, the children and the widow. If the latter proposition is correct, then the widow would be entitled to eight thousand three hundred and thirty-three dollars thirty-three cents of the fifteen thousand dollars on hand at *A*'s death. We do not believe that this latter is a correct construction of our statutes on that subject.

It is next urged, that the evidence does not show that the several sums obtained from the deceased by his children, and evidenced by said notes, were intended as advancements. There is some conflict in the evidence upon this point, but the least that can be said is that it tends to sustain the finding of the Court.

Johnson v. Seymour.

Per Curiam.—The judgment is affirmed, with costs.
J. B. Julian and J. F. Julian, for the appellant.
George Holland and John F. Kibbey, for the appellees.

JOHNSON v. SEYMOUR.

In an action upon a note payable in "wagon-work," it is not necessary to aver that the plaintiff had designated the kind of wagon-work to be received.

The terms "wagon-work," as used in such a note, unexplained by circumstances or otherwise, evidently do not mean *labor* merely, but wagons, or, perhaps, parts of wagons, either complete or incomplete, including both the materials and the labor bestowed upon them.

No demand is necessary before suit upon such a note, the time of payment being fixed by the note.

If the payee, or holder of such a note, had the right of designating what particular kind of wagon-work he would require, and failed to do so before its maturity, he thereby waived his right, and the right of designation then devolved upon the maker, whose duty it was to exercise that right, and make a tender of the property, or he would become liable to pay the amount in money.

A paragraph which assumes to answer more than the matter pleaded will bar, is bad on demurrer.

APPEAL from the *La Grange* Common Pleas.
WORDEN, J.—Seymour, as assignee of *Kenyon*, sued Johnson, on the following instrument, viz.:

"\$ 361.21. On or before the first day of April next, I promise to pay *A. P. Kenyon*, or bearer, three hundred and sixty-one and twenty-one hundredths dollars, in wagon-work, for value received. EZEKIEL JOHNSON."

"STURGIS, January 22d, 1858."

Johnson v. Seymour.

The defendant answered in twelve paragraphs. Demurrs were sustained to a number of these paragraphs, and exception was taken to the ruling as to the twelfth only. Issues were formed and tried, resulting in a verdict and judgment for the plaintiff.

Two errors only are assigned. The first relates to the ruling upon the twelfth paragraph of the answer, and the second to the ruling of the Court, in rejecting certain evidence offered.

It is insisted that, admitting the twelfth paragraph of the answer to be bad, the demurrer should have been overruled, because the complaint is bad. The note, it will be observed, is payable "in wagon-work," and it is insisted that the complaint should have averred that the plaintiff had designated the kind of wagon-work to be received, which was not done.

The appellant argues that the "wagon-work" mentioned in the note, should not be regarded in the light of specific articles, but as *labor*, and hence, that the plaintiff or holder of the note should have made such designation of the labor to be performed.

Whether or not the conclusion would follow from the premises, we need not determine, as we can not adopt the premises thus assumed. The terms "wagon-work," as used in the note, unexplained by circumstances or otherwise, evidently do not mean *labor*, as hauling or otherwise, with a wagon or wagons; nor do they mean, simply labor or work to be performed by the maker of the note in the construction of wagons. But they do mean, as we think, wagons, or, perhaps, parts of wagons; wagons either complete or incomplete, including both the materials and the labor bestowed upon them. This being the case, the note is governed by the general principles applicable to contracts for specific articles. The time of payment being fixed by the note, no demand was necessary before bringing suit. *Frazee v.*

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McChord, 1 Ind. 224. 2 Parsons on Cont., p. 162. If the payee or holder of the note had the right of designating what particular kind of wagon-work he would require, and if he neglected to do so up to the time the note became due, that was a waiver of his right; and the right of such designation devolved upon the defendant, whose duty it was to exercise that right, and make a tender of the property; otherwise he became liable to pay the amount in money. *Vide* note to *Frazee v. McChord*, *supra*, and *Gilbert v. Danforth*, 2 Seld. 585. The objection to the complaint can not prevail.

The paragraph of the answer in question sets up, by way of set-off, a claim against *Kenyon*, the payee of the note, for three hundred dollars. This was pleaded in bar of the whole complaint, and if otherwise good, the demurrer was correctly sustained, because the paragraph assumed to answer more than the matter pleaded would bar. *Conwell v. Finnell*, 11 Ind. 527. There was no error in the ruling on the demurrer.

The evidence offered, and rejected, was the transcript of a certain judgment. The evidence was properly rejected, because it was irrelevant to any of the issues in the cause. The paragraph of the answer, in support of which the evidence was offered, had been demurred to, and the demurrer sustained. There is no error in either of the rulings complained of, hence the judgment must be affirmed.

Per Curiam.—The judgment below is affirmed, with costs.

Robert Parrett, for the appellant.

Williams and Others *v.* Conwell.

WHITEHALL and Others *v.* THE STATE, on the relation of JONES and Others.

A demurrer to a complaint on an administrator's bond, assigning several breaches, one of which is well assigned, should be overruled.

The defendants can not complain of a special finding by a jury, of damages on such breaches as are good, and a failure to find damages on those which are not well assigned.

APPEAL from the *Fountain* Common Pleas.

Per Curiam.—In a suit upon an administrator's bond, where several breaches are assigned, if one be well assigned, a demurrer to all must be overruled.

Of a special finding on such breaches, wherein the jury assess damages upon a part of the breaches which are good, and assess none upon the others, the defendants can not complain because the jury did not assess damages against them upon all the breaches.

When the heirs sue specially for injury to them by the malfeasance of the administrator, the fact that the widow has been paid her share, and does not complain, is not a material fact in the suit.

The judgment is affirmed, with five per cent. damages and costs.

Mallory, Birch, and Taylor, for the appellants.

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WILLIAMS and Others *v.* CONWELL.

APPEAL from the *Wayne* Common Pleas.

Per Curiam.—In this case no exception, in any form, appears to have been taken to the rulings of the lower

Jenkins and Another v. Long and Another.

Court, nor was there any motion for a new trial or in arrest. And moreover, in looking into the record, we perceive no error.

The judgment is affirmed, with two per cent. damages and costs.

W. S. Ballinger and D. M. Bradbury, for the appellants.

J. B. and J. F. Julian, for the appellee.

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JENKINS and Another v. LONG and Another.

At common law, fraud could be given in evidence under the general issue; but under the code, fraud must be specially pleaded, by averring the existence of all the elements necessary to be proved to make a fraud.

If the alleged fraud consist in false representations, such representations must go to a material fact, and be made under such circumstances that the party has a right to rely upon them, and it must appear that he did rely upon them.

APPEAL from the *Wayne* Circuit Court.

PERKINS, J.—Suits upon notes and a mortgage.

Answer. That the notes were given for the purchase money of a livery stable, horses, carriages, etc., and the good-will of the stable; that the owners represented that the profits of the stable were from fifteen hundred to two thousand dollars a year; whereas, they aver, that the business, instead of being from fifteen hundred to two thousand dollars a year, never cleared exceeding two hundred dollars.

To this answer, a demurrer was sustained. It will be observed that the answer is uncertain, in this, that it does not plainly appear whether the parties understood the representation to refer to gross receipts or net profits. A motion to have it made more certain might have prevailed.

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If the representation was that the profits of the business had been, and then were, fifteen hundred dollars a year, and the representation was relied on in making the purchase, and it was false, it may have been such an one as amounted to fraud; because it was a representation of a fact, and not the expression of an opinion; whereas, had the representations been that the profits would amount, in future, to fifteen hundred dollars, it would not have been a fraud, because it would have been the expression of an opinion, and not the representation of an asserted existing fact. See *Fry on Specif. Perf.*, chap. 12. The subject of fraud is most excellently treated in the 2d edition of *Fry on Specif. Perf.* But the answer, in the case at bar, was bad, for failing to aver that the purchase was made in reliance upon the representation.

At common law, fraud could be given in evidence under the general issue, or under a general plea of fraud. *Cohee v. Cooper*, 8 Blackf. 115. But, under the code, fraud must be specially pleaded; and the answer of fraud must contain the averments of all the elements necessary to be proved to make a fraud; and they are that the representation must go to a material fact; must be made under such circumstances that the party has a right to rely on it; the party must rely on it, and it must be false to a material extent. See the common law forms of a special plea of fraud. 3 Chit. Pl. 962. 2 Swan Pr. 742. See *Mattock v. Todd*, at this term.

Per Curiam.—The judgment is affirmed, with one per cent. damages and costs.

John F. Kibbey, for the appellants.

M. Wilson, for the appellees.

Crouse v. Holman.

19b 30
189 510

WHITEHALL v. THE STATE, on Relation of HALL.

In a doubtful case, where the Court of Common Pleas removes an executor, administrator, or guardian, this Court will not interfere, by reason of the large discretion given to that Court in such matters.

APPEAL from the *Fountain* Common Pleas.

Per Curiam.—This was a proceeding to remove an administrator for neglect of duty, etc. The removal was made. When we consider the supervisory power of the Probate Court, which our Common Pleas is, over executors, administrators, and guardians, and the duty resting upon that Court to vigilantly exercise it, taken in connection with the amount of personal knowledge in the premises, which the Court will generally, as a matter of course, possess, it will at once be conceded that, in a doubtful case, this Court should not interfere with the action of the Court below. See 2 R. S. by G. & H., p. 491, and notes. Ind. Ex. Man., p. 174, *et seq.*

The judgment below is affirmed, with costs.

Mallory, Birch, and Taylor, for the appellant.

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19b 30
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CROUSE v. HOLMAN.

A conveyance executed by a person *non compos mentis*, and not under guardianship, is not absolutely void, but voidable only.

No contract, valid as to one party, can be held utterly void as to the other.

Section 11, 2 R. S. 1852, p. 233, which declares "every contract, sale, or conveyance of any person, *while a person of unsound mind*, shall be void," applies alone to "a person of unsound mind," found to be so in the mode prescribed by the Statutes.

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Although a mortgagee, holding several notes secured by the same mortgage, which mature at different times, and one of which is due, may foreclose as to all, yet he may institute his suit to foreclose alone as to the note due, and if he do not prosecute but one such suit at the same term of Court, he shall recover costs in each successive foreclosure.

A judgment of foreclosure on one such note can not be pleaded as a bar to a subsequent suit on the same mortgage to enforce payment of another note, because said notes may properly be considered as so many successive mortgages, and successive causes of action.

The best and only legitimate evidence of the value of land at the time of its sale, is the opinion of witnesses who have personal knowledge of the land, and, from their own observation, have become acquainted with its value.

A person, alleging unsoundness of mind at a particular time, must establish, by the preponderance of evidence, that he was not of sound mind at the given time; but when it appears that a person was, at a given time, of unsound mind, unless the unsoundness was occasioned by some temporary or transient cause, the legal presumption arises, that that state of mind continues, until the contrary is made to appear, by evidence; but if, notwithstanding such unsoundness, the person had sufficient disposing memory, as if the unsoundness consisted of monomania, not impairing his capacity to acquire or dispose of property, then it devolved upon the party interested to sustain his acts in the particular case, to show that fact by evidence.

APPEAL from the *Tippecanoe* Circuit Court.

DAVISON, J.—This was an action by *Holman* against *Crouse*, to foreclose a mortgage upon real estate, in *Tippecanoe* county. The mortgage bears date January the 1st, 1856, and was given to secure the payment of seven promissory notes, each of even date therewith, and each for one thousand dollars. The last three notes, viz.: one payable January the 1st, 1860, another due January the 1st, 1861, and another payable on the 1st of January, 1862, were alone involved in this suit.

Crouse v. Holman.

Defendant's answer consists of a general denial and four special defenses. The second and fifth make no points in the case, and will not, therefore, be further noticed. The third defense alleges, that the notes and mortgages sued on, with other notes, were given for the purchase money of the land described in the mortgage, which was, at the date of the mortgage, sold and conveyed by the plaintiff to the defendant, and that, at the time of the supposed execution of said notes and mortgage, by the defendant, he was of *unsound mind*, and incapable of transacting business, which unsoundness of mind was, at that time, well known to the plaintiff, who was then expressly notified thereof by the defendant's mother; but the plaintiff, with a full knowledge of the defendant's condition, sold him the land for a sum greatly beyond its value, to wit: the sum of two thousand dollars more than it was worth; wherefore, defendant says, that he did not execute said notes and mortgage, or either of them. Defendant avers that he has paid a large amount of said purchase money, viz.: the sum of six thousand four hundred and fifty dollars; has made lasting and valuable improvements on the land, and has paid taxes thereon to the amount of one hundred and twenty dollars; that he has been in possession of the land from the 10th of April, 1856, until the present time, and he offers to account for the rents and profits of the land, etc., after deducting the value of said improvements and the amount paid for taxes, and to have the same deducted from the purchase money paid to the plaintiff as aforesaid, and for any balance of such purchase money, with interest, etc., the defendant demands judgment, etc. This paragraph is verified by affidavit.

By the fourth defense, it is alleged, *inter alia*, that the plaintiff, at the April term, 1858, recovered a judgment against the defendant, in the *Tippecanoe* Circuit Court, upon the same identical mortgage, for the foreclosure of all

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the equity of redemption of the defendant, in and to the lands therein described, etc., all of which will appear, etc.

To the third defense, the plaintiff replied, that on the 1st of January, 1856, he executed, to the defendant, a deed in fee simple, for the land described in the mortgage; that, at the same time, the defendant paid him two thousand five hundred dollars, and executed the mortgage and notes in suit, with several other notes, for the balance of the purchase money; that defendant took possession of the lands sold, on the 1st of April, 1856, and continued in possession, and still was in possession, enjoying all the rents and profits; that he had voluntarily paid the first, second, third, and fourth installments of the purchase money, as they respectively matured, not making any objection, either that the mortgage and notes had been obtained from him by fraud, or that, at the time he executed them, he was of *unsound mind*, or that the bargain was hard, or that any advantage whatever had been taken of him. And further, the reply alleges that defendant was, at the time he took possession of the premises, in April, 1856, of sane mind, and had so remained up to the time of the bringing of this suit, and that he had, at divers times, expressly ratified his contract; that, in so taking possession of the premises, and enjoying the rents and profits, and voluntarily paying the several installments as they became due, being all this time of sane mind, and of full capacity to transact business, he fully ratified and confirmed his contract of purchase, and the execution of the mortgage and notes sued on, etc.

The reply to the fourth defense, after setting out the record of the former recovery, mentioned in that defense, alleges that no other foreclosure had been had; that it was taken, on a warrant of attorney, executed by the defendant, authorizing a judgment to be confessed against him, on one of the notes secured by the mortgage, and the foreclosure of the mortgage, and that the proceedings set out in this

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reply were had, in pursuance of an express agreement entered into between the defendant and Robert C. Gregory, the then attorney for the plaintiff; that the foreclosure of the mortgage for the note then due was not to operate as a discharge of the mortgage security for the remaining notes; nor was it in any manner to operate to the prejudice of the plaintiff's rights to enforce the security as to the notes secured by the mortgage, and not then due. And, further, no execution was ever issued, or sale had, under that decree of foreclosure; but the defendant voluntarily paid the amount, in that suit, adjudged against him.

To these replies the defendant demurred severally, but his demurrers were overruled, and he excepted. The issues were submitted to a jury, who found for the plaintiff. Motions for a new trial, and in arrest, denied, and judgment on the verdict.

At the proper time the defendant moved this instruction: "If the jury believe, from the evidence, that the defendant, at the time of making the contract in question, was a person of unsound mind, and the plaintiff, knowing that fact, took advantage of the defendant's weakness to drive an advantageous bargain, then the contract is utterly void, and can not be confirmed, unless upon some good and sufficient consideration." The Court refused so to instruct the jury, and the defendant excepted. It may be noted that the point made by this instruction is involved, also, in the reply to the third defense.

We have a statute "defining who are persons of unsound mind, and authorizing the appointment of guardians for such persons," etc., which says: section 1, that "The words, 'persons of unsound mind,' as used in the statute, or in any other statute of this State, shall be taken to mean any idiot, *non compos*, lunatic, monomaniac, or distracted person." The statute then points out the mode of proceeding against any one alleged to be "a person of unsound mind, and inca-

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pable of managing his own estate," authorizes an issue as to such unsoundness of mind to be made, and tried by a jury, and provides that "If such jury shall find" the person alleged to be "of unsound mind" to be so, "the Court shall appoint a guardian for such person, who shall have custody of his person, and the management of his estate." The statute also provides, that whenever it is alleged that such person of unsound mind has become of sound mind again, the fact may be tried and determined in the same manner as the allegation of the unsoundness of mind." And further, the same statute declares, in section 11, that "Every contract, sale, or conveyance of any person, *while a person of unsound mind, shall be void.*" 2 R. S. pp. 233, 234, 235.

The section just recited is relied on by the appellant as settling the point under discussion. He contends, that under it the contract entered into by him, he being at the time of unsound mind, was absolutely void, and, in sequence, incapable of ratification. We are not inclined to adopt that conclusion. It is not pretended that *Crouse*, the defendant, had ever, under the provisions of the statute, been found to be "a person of unsound mind," and the result seems to be that that section does not strictly apply to the case at bar. Thus, it has been decided that "The deed of a person, *non compos mentis*, under guardianship, is void; that the decree and letters of guardianship take from him all capacity to convey; but the deed of such person, not under guardianship, conveys a seizin, it being voidable only, and not void." *Wait v. Maxwell*, 5 Pick. 217. In view of this decision, which seems to be correct, we deem the section above quoted as applicable alone to "a person of unsound mind," found to be so in the mode prescribed by the statute. At all events, the term "void," used in the section, when applied to the contract of a person *non compos*, not under guardianship, should not be taken in its precise technical sense, as contradistinguished from "voidable." *Allis v. Billings*, 6 Met. 415.

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In that case it was held, that "A deed, conveying land, by a person when of unsound mind, was voidable only, and not void." The case thus cited, is relied on in *Arnold v. The Richmond Ironworks*, 1 Gray 434, as a correct exposition of the law. And see, also, 1 Blackstone's Com. 241, where it is said that "Idiots, and persons of non-sane memory, infants, and persons under duress, are not disabled to convey or purchase; but *sub modo* only, for their conveyances and purchases are voidable only, and not absolutely void." But, in this case, it must be conceded that, as to Holman, the plaintiff, the contract is plainly valid; and it may, in our judgment, be laid down as a settled rule, that no contract, valid as to one party, can be held utterly void as to the other. 15 John. R. 528. Our opinion is, that the demurrer to the reply to the third defense was correctly overruled, and that, in refusing the instruction, there was no error.

It appeared, by the evidence, that the plaintiff, at the April term, 1858, recovered a judgment against the defendant in the Tippecanoe Circuit Court, upon one of the notes secured by the mortgage, and the only one then due, and also a decree of foreclosure, and an order of sale as to the amount recovered; but it also appeared, that that judgment was paid off by the defendant, without sale of the mortgaged premises. In reference to this evidence, the defendant moved thus to instruct the jury: "If you believe that the plaintiff had had one foreclosure of the mortgage now in suit, and had not foreclosed as to all the notes therein embraced, then, the plaintiff having neglected to recover for all he might in said foreclosure, is estopped and barred from a second foreclosure of the same mortgage, unless you should find that there was an understanding or agreement between the plaintiff, or his attorney, and the defendant, that the same should not operate to prevent a future foreclosure of the same mortgage." The Court refused the instruction. We are referred to *Fischli v. Fischli*, 1 Blackf. 360, where it

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is laid down as a general rule, that " Whenever a matter is finally determined by a competent tribunal, it is considered at rest forever; and that this principle embraces not only what was actually determined, but every other matter which the parties might have litigated in the cause." As we understand the latter branch of the rule, it relates simply to every matter which might have been litigated under the pleadings in the cause. Does it apply to the question raised by the instruction? The statute authorizes a party, who holds notes secured by a mortgage, which are due at different periods of time, when one or more of them become due, to foreclose the mortgage as to all the notes. 2 R. S. p. 176. Still, he may, as in this instance, institute a suit to foreclose alone as to a note which has become due, because the notes being due at different periods, are considered as so many successive mortgages; and it seems to follow, that they may, in respect to the foreclosure, be deemed so many successive causes of action. *Harris v. Harlen*, 14 Ind. 439; *Murdock v. Ford*, 17 *Id.* 52. If this construction be correct, and we think it is, a judgment of foreclosure on one of the notes can not be pleaded as a bar to a subsequent suit on the mortgage. But there is another reason why the plaintiff's action was not barred by the former recovery. The defendant paid the judgment debt; the mortgaged premises were not sold under the decree. He still retained his equity of redemption, and the result is, the foreclosure was incomplete, and not effective for any purpose, other than to preclude a second recovery and foreclosure, as to the note embraced in the proceeding. The Court, it seems to us, in its refusal to give the instruction, committed no error. During the trial, the defendant offered to prove by Miller, a witness, that, some eight months prior to the sale of the lands to defendant, the plaintiff proposed to sell them to witness for two thousand dollars less than he afterward sold them to defendant, in similar payments; and that the lands, in that space of time, had not

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changed in value. This evidence was refused, and, we think, correctly. What the plaintiff may have offered to take for his land eight months before he sold it, is no proper measure of its actual value when he did sell it; and, though the value may not have changed within the stated period, still, the plaintiff, when he offered to sell, may have acted under inducements to take less than the real value. Indeed, the best and only legitimate evidence of the value of the land, at the time of the sale, would be the opinion of witnesses who had a personal knowledge of the land, and, from their own observation, had become acquainted with its value.

Another question arises in the record. The defendant, at the proper time, moved to tax the costs against the plaintiff, upon the ground that the mortgage, sought to be foreclosed in this action, had been, at a previous term of the Court, foreclosed, as to one of the notes thereby secured. The motion was overruled, and an exception taken. In support of this motion we are referred to section 401 of the Practice Act. That section provides thus: "When the plaintiff shall, *at the same Court*, bring several actions against the defendant, upon demands which might have been joined in one action, he shall recover costs only in one action, unless it shall appear to the Court that the actions affect different rights or interests, or other sufficient reasons exist why the several demands ought not to have been joined in one action." 2 R. S. p. 127. As we construe this section, the words "*at the same Court*," in the connection in which they are used, were intended to mean "*at the same term*" of the Court. This construction, in view of the entire enactment, is obviously correct, and being so, the section does not apply to the point involved in the motion. The plaintiff, it is true, might, when he instituted the first suit on the mortgage, have included all the notes which it secured; but, as we have seen, it was competent for him to foreclose as to one or more of the notes that had matured. And having done

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this, he may, at a subsequent term of the same Court, proceed to foreclose as to the other notes, without incurring the penalty prescribed by the statute, of paying the costs of suit.

The defendant moved another instruction, which is as follows: "It devolves on the defendant, in this case, to show, by the preponderance of evidence, that he was not of sound mind at the time he made the contract involved in this case; but when it appears in proof that a person was, at any given time, of unsound mind, (unless from some temporary or transient cause,) the legal presumption is, that that state of mind continues until the contrary is made to appear by evidence. But if, notwithstanding such unsoundness, the defendant had sufficient disposing memory; if the unsoundness consisted, for instance, of monomania, not impairing his capacity to acquire or dispose of property, it devolves upon the plaintiff, in this case, to show that fact." This instruction, thus moved, was refused by the Court, and the defendant excepted. In this, we think, there was error. There is evidence in the record, tending to prove a state of facts to which the instruction was applicable, and, in our judgment, the instruction itself enunciates a correct exposition of the law. In *Kenworthy v. Williams*, 5 Ind. 375, which was a proceeding to invalidate a will, it was held, that "Where unsoundness of mind is established, the burden of proving a sufficient disposing memory, when the will was executed," devolved on the party setting up its validity. This decision is sustained by numerous authorities, and is, it seems to us, decisive of the point under consideration. For the error in refusing the last instruction, the judgment must be reversed.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

Robert C. Gregory and William C. Wilson, for the appellant.
Z. Baird and J. J. Jones, for the appellee.

Lamb and Others *v.* Donovan and Another.

LAMB and Others *v.* DONOVAN and Another.

A contract, which is the foundation of an action, will be deemed to be unwritten, unless it appear, directly or inferentially, from the complaint, to have been in writing.

A contract made with one person for the benefit of, or to secure the payment of money, to another, may be enforced by the latter.

An action will lie to recover the consideration for the conveyance of land, although the deed may recite that the consideration has been paid, and an action will also lie to recover a different consideration from that expressed in the deed, and not inconsistent therewith.

One person procures a conveyance of a tract of land to be made to another person, in consideration whereof the latter agrees to maintain the former and his wife during their lives, and, after their death, to pay to a third person a certain sum of money; *Held*, that said third person may maintain an action for said sum of money, although said agreement was not in writing.

APPEAL from the *Fountain* Circuit Court.

WORDEN, J.—This was an action by *Giles S. Donovan* and *Mary Ann*, his wife, against the appellants. The complaint sets up, in substance, the following facts:

That on, etc., *Barnabas Lamb*, now deceased, who was the father of the defendants and the said *Mary Ann*, having purchased a piece of land of one *Isaac M. Coen*, but not having received a conveyance therefor, procured the said *Coen* to convey the said land to the defendants, in consideration of which the defendants agreed to support and maintain the said *Barnabas* and his wife during their natural lives, and, after their death, to pay to the said *Mary Ann* the sum of one thousand dollars. The said *Barnabas* and his wife having died, this suit was brought for the recovery of the thousand dollars thus stipulated to be paid. The deed from *Coen* to the defendants is set out, the consideration therein expressed being four thousand dollars. There appear, also,

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among the pleadings, a mortgage executed by the defendants to *Barnabas Lamb* to secure the maintenance provided for, and also a mortgage executed by the defendants to *Coen*, to secure one thousand dollars of unpaid purchase money.

A demurrer to the complaint was overruled; issues were formed and tried, resulting in a verdict and judgment for the plaintiff.

Two objections are made to the proceedings: *first*, that the complaint was bad, and *second*, that the Court admitted parol evidence to prove the contract alleged. One objection to the complaint is, that it sets up no written agreement for the payment of the thousand dollars, nor does it aver expressly that it was by parol. There is nothing in this objection. It sufficiently appears that the agreement relied upon was by parol. Unless it appears, directly or inferentially, that a contract sued upon was in writing, it will be deemed to be an unwritten contract.

The main question in the case, arising on the demurrer, and on the admission of the evidence, is, whether the parol agreement for the payment of the thousand dollars, in view of the facts appearing, is valid; for if valid, it can, of course, be proven by parol. It is insisted that if this agreement is upheld, it will be a plain violation of the rule that makes a written contract between the parties the exclusive medium of determining to what the parties bound themselves. This rule, in our opinion, has no application to the case before us. The contract sued upon was, for aught that appears, entirely by parol. The causing of the deed to be made to the defendants by *Coen*, and the execution of the mortgages by the defendants, were but in part *execution* of the parol contract that had already been made. These instruments do not constitute the agreement sued on, but were executed in part performance of that agreement. Had the agreement been that the defendants should pay to the grantor, *Barnabas*, one thousand dollars, and also to maintain him and

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his wife during life, he might, undoubtedly, have brought an action for the money, although he had taken a mortgage to secure the maintenance. An action will lie to recover the consideration for the conveyance of land, even though the deed recite that the consideration has been paid, or to recover a different consideration than that expressed in the deed, and not inconsistent therewith. *Vide Emmons v. Littlefield*, 13 Maine, 233. *Bingham v. Weiderwax*, 1 Comst. 509. *Rockhill v. Spraggs*, 9 Ind. 30.

The agreement having been made, so far as the one thousand dollars are concerned, for the benefit of said *Mary Ann*, she may sue thereon.

We think there is no error in the record, wherefore the judgment must be affirmed.

Per Curiam.—The judgment below is affirmed, with costs.

Mallory and Birch, for the appellants.

McDonald and Roach, for the appellees.

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SHEPHARD *v.* BEEBE.

APPEAL from the *Ripley* Common Pleas.

Per Curiam.—On the evidence, we think there ought to be another trial of this cause.

The judgment is reversed, with costs; cause remanded for another trial.

Edward P. Ferris, for the appellant.

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THE PRESIDENT AND DIRECTORS OF THE TERRE HAUTE AND RICHMOND RAILROAD COMPANY *v.* SMITH.

In an action against a railroad company for killing stock, commenced in the Common Pleas or Circuit Court, the complaint should aver

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that the killing was the result of negligence on the part of the company.

The objections that there is a want of jurisdiction, and of a cause of action, may be raised upon appeal.

APPEAL from the *Putnam* Common Pleas.

Per Curiam.—Suit by *Smith* against *The Terre Haute and Richmond Railroad Company*, to recover for stock killed by the machinery of the road, in 1858. The suit was commenced in the Common Pleas, and the complaint did not allege negligence, but simply that the road was not fenced.

A demurrer to the answer reached back to the complaint.

The cases of *The Jeffersonville, etc., v. Martin*, 10 Ind. 416; *The Indianapolis, etc., v. Taffe*, 11 *Id.* 458; and *Indianapolis, etc., v. Kercheval*, 16 *Id.* 84, are decisive that the action can not be maintained.

The objections that there was a want of jurisdiction, and of a cause of action, may be raised, upon appeal.

The judgment is reversed, with costs; cause remanded to be dismissed.

Henry Secrest and Solon Turman, for the appellants.
Williamson and Daggy, for the appellees.

WHITE *v.* CALLINAN.

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Where a note is made payable to an unmarried woman, and she afterward marries, and transfers the note, by delivery merely, as a gift, to her husband, he may maintain an action on the same as his own.

APPEAL from the *Tippecanoe* Common Pleas.

Per Curiam.—This was a suit by *Callinan* against *White*,

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upon a promissory note, payable to *Wheelan & Co.*, and by them indorsed in blank to *Miss Gilligan*. She subsequently married *Callinan*, and delivered the note, thus indorsed, to him as his property, as, in short, a gift, and does not set up any further claim to it.

White, the maker of the note, now answers to *Callinan's* suit upon it, that it is not his, but his wife's property. *Callinan* takes issue of fact upon the answer, and the above facts appear in evidence on the trial of the issue. The Court held that the note was *Callinan's*, and we affirm the judgment.

Affirmed, with five per cent. damages and costs.

Daniel Mace, for the appellant.

George Gardner, for the appellee.

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KENYON and Others v. WILLIAMS.

A complaint on a note, averring that it was made and delivered to the plaintiff by the defendants, who were partners, by their agent, who signed the same, A. B., "Agt.", and that it remains unpaid, would not be a good complaint at law; but in equity, as a general rule, wherever an agent has contracted within the sphere of his agency, and the principal is not, by the form of the contract, bound at law, the Court will enforce it against the principal, upon principles *ex aequo et bono*.

Matter in abatement can not be answered, either after or concurrently, with matter in bar, but must precede it, or it will be considered to have been waived.

APPEAL from the *St. Joseph* Circuit Court.

WORDEN, J.—This was an action by *Williams* against the appellants, upon a promissory note. Judgment for the plaintiff.

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The complaint alleges, that, on the 23d day of June, 1860, the defendants were co-partners, trading and doing business under the firm name and style of the "Farmers' Union Store," at Elkhart, on which day the defendants, by their agent, *Solomon N. Chappel*, (who was one of the firm,) made and delivered to the plaintiff the following promissory note, which is unpaid, viz.:

"\$250.

ELKHART, June 23d, 1860.

"Due *Michael Williams*, or order, two hundred and fifty dollars, value received, with interest at ten per cent., if not called for within three months; if paid in three months, no interest, without any relief whatever from valuation or appraisement laws.

S. N. CHAPPEL, *Agt.*"

The defendant, *S. N. Chappel*, who signed the note, pleaded in abatement, under oath, that he was not a resident of *St. Joseph* county, and had not been there served with process, but that he was, on, etc., a resident of *Elkhart* county. A demurrer was sustained to this answer.

The other defendants demurred to the complaint, but the demurrer was overruled.

These rulings present the first and most material question for our consideration, viz.: Does the complaint state a good cause of action against any of the defendants, except *Chappel*, the maker of the note? If not, the demurrer to the complaint filed by the other defendants should have been sustained; and, for the same reason, the demurrer to *Chappel's* answer in abatement should have been overruled, as, in such case, he would be the sole defendant who could be sued on the note, and the suit should have been in the county where he resided. Code, sec. 33.

The note purports to bind no one but *Chappel*. The addition of "agt.", appended to his signature, does not add to, or vary, its legal effect. The question then arises, whether extrinsic matter can be averred and supported by *parol*

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proof, connecting other parties with the note, and making them liable *thereon* as makers. The authorities upon this point are somewhat conflicting, but we think that, *at law*, the weight of them is against the admission of such evidence, so as to support an action *upon the instrument* against other parties. Parsons on Cont., p. 48, and authorities cited in note *a*. Smith on Cont., p. 412, and notes. *Thompson v. Davenport*, 2 Smith Lead. Ca., p. 212, and notes. Story on Agency, sec. 147, and note. *The Board of Commissioners of Warrick Co. v. Butterworth*, 17 Ind. 129.

But the rule in equity is different. Says Mr. Justice Story: "Indeed, it may be asserted, as a general rule, that in all cases where an agent has contracted within the sphere of his agency, and the principal is not, by the form of the contract, bound at law, a Court of Equity will enforce it against the principal, upon principles *ex aequo et bono*."

In the case of *Clark's Executors v. Van Riemsdyk*, 9 Cranch, 153, a bill in equity was maintained against a firm to recover the amount of a bill of exchange drawn by one of its members, in his own name only.

The Court below was authorized to administer equitable as well as legal relief, and, in view of this fact, we are of opinion that the demurrer to the complaint was properly overruled, as the averments therein are sufficient to connect all the partners with the note, and hold them equitably liable *thereon*. It follows that the demurrer was properly sustained to the answer of *Chappel* on abatement, some of those properly made defendants residing in the county where the suit was brought.

After the above steps had been taken in the cause, the defendants answered: 1. By general denial. 2. In abatement, that there were other parties, naming them, constituting the firm, who were not joined as defendants. 3. Usury.

The plaintiff moved to strike out the second paragraph of the answer, but the motion was overruled, and issue

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taken thereon; upon the trial of which issue by the Court, there was a finding for the plaintiff. On the trial of this issue, the defendants moved for leave to amend the answer, by adding names thereto, so as to make it correspond with the proof, but this motion was overruled. We shall not stop to inquire whether any error would have been committed in refusing leave to amend the answer in abatement, had it been properly in the case. The non-joinder was matter of abatement, and could not have been taken advantage of otherwise. Chitty Plead. 46. Whatever may be the practice in New York, or elsewhere, of pleading in bar and abatement at the same time, the rule has been settled in this State, under the code, that, as at common law, a plea in bar is a waiver of matter of abatement. Matter of abatement can not be answered, either after, or concurrently with, matter in bar. *Jones v. The Cincinnati Type Foundry Co.*, 14 Ind. 92.

The Court should have stricken out the answer setting up the non-joinder, but as the issue formed thereon was found for the plaintiff, no harm was done.

The issues upon the merits were tried by the Court and found for the plaintiff, and the evidence in the cause is before us, which, in our opinion, fully justifies the finding.

The defendants had formed themselves into a joint stock company, the objects of which are set forth in the following preamble to their articles of association, or "constitution:"

"The object of this association is the promotion of the interests of the producing class, by relieving them from the payment of the intermediate profit now charged, by the retail dealer, upon articles entering largely into the consumption of every family, by purchasing and distributing the same at the lowest point attainable, and by subserving such other interest in the sale of produce as may be found practicable and beneficial; to secure concert of action in furtherance of these objects, we associate and organize our-

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selves into a body mercantile, and designate the same as the 'Farmers' Union Store,' located in the village of *Elkhart*, *Elkhart* county, Indiana, and adopt the following constitution," etc.

The "constitution" provides, among other things, for subscriptions of stock to the association, and for the purchase and sale of goods, on terms therein provided for; and, also, for the appointment of a managing agent, who should, *ex officio*, be secretary and treasurer of the association.

It appears that *Chappel*, who signed the note, was the managing agent, being one of the members of the association, and that the note was given for money deposited by the plaintiff with *Chappel*, as the agent of the association, and that the money was used by the association. *Chappel* says he signed the note for the members of the association. These facts clearly make the members of the association liable in equity, upon the note. "In joint-stock, and other large companies, which are not incorporated, but are a simple, although an extensive partnership, their liabilities to third persons are generally governed by the same rules and principles which regulate common commercial partnerships." Story on Part., sec. 164.

There is no error in the record of which the appellants can complain, hence the judgment must be affirmed.

Per Curiam.—The judgment below is affirmed, with costs.
O. H. Main, A. Heath, and J. A. Liston, for the appellants.

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HITTNER v. The State.

If a jury, in a criminal case, retire to consider of their verdict, in the charge of a bailiff who has taken a general oath to discharge his duties as such, and they afterward return a verdict, the same

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will not be disturbed because the bailiff's oath was not in the precise form prescribed by law.

It is not error, on the trial of a prisoner for murder, to permit the State to prove that he attempted, while in jail, to escape, but was retaken.

On the trial of a defendant on an indictment for murder, it is error to charge the jury, without qualification, that, if the defendant made an unlawful attack, or got into a fight with the deceased, upon a sudden heat, and slew him in the controversy, he would be guilty of manslaughter, at any rate, because, even under such circumstances, the defendant would be entitled to the benefit of any retreat, flight, or withdrawal from the contest which he might, in good faith, have made, or attempted to make, although he was the aggressor in the first instance.

APPEAL from the *Floyd* Circuit Court.

HANNA, J.—Hittner was indicted for murder in the first degree; tried and convicted of manslaughter.

Several errors are assigned.

I. Upon the ruling of the Court in receiving and filing the verdict.

This is based upon the fact that the jury, while considering of their verdict, were in charge of a person sworn to "well and truly discharge his duties as bailiff to said jury according to law;" and who was not sworn in the form, it is insisted, that is prescribed by statute. Sec. 329, p. 118, 2 R. S. 1852. It is not shown that said jury or bailiff misbehaved. A motion to discharge the prisoner for the same cause was also overruled.

It appears to us the statute in question is directory to the officer. *People v. Cook*, 14. Barb. 259. 4 Seld. 88. 19 Wend. 143. His duty is thereby prescribed, and a performance thereof would devolve upon him, upon his accepting the place, and taking the general oath to discharge his duties.

It might be further said, that, even if this should be

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regarded as a technical error, it should not reverse the judgment. Sec. 160, p. 382, 2 R. S.

II. In overruling a motion for a new trial.

1. Because of the reception of improper testimony, viz.: the evidence of the sheriff and jailer, to the effect that while the defendant was in jail it was broken, and he and others attempted to escape, but were retaken. It had been shown that, at the time of the homicide, the defendant did not attempt to escape. These were circumstances for the consideration of the jury; perhaps, as the Court said to them, they did not "amount to much."

2. In the charges given and those refused. The defendant requested the Court to instruct in writing. This duty was performed. The defendant also asked special instructions, which were reduced to writing, but the Court refused to give them. The legal propositions intended to be advanced by the special charges appear to us, with perhaps one exception, to be conveyed in the general charge of the Court. The ideas are, apparently, the same, although the language in which they are couched is not. *Gra. & W. on New Trials*, 8d vol., 848.

The exception above indicated arises upon that part of the instruction in reference to the right of self-defense.

The charge given was that "If the parties quarrelled, and got into an unpremeditated fight, and, in the course of that fight, the defendant, without any previous malice, in the sudden heat of the contest, pulled out his knife, and stabbed the deceased, that would be manslaughter, and, in such a case as that, in the absence of malice, it would make no difference who gave the first blow. The doctrine of self-defense must be considered with reference to the condition of the parties at the time. If the defendant was unlawfully attacked by the deceased, then he might resist, and lawfully kill the deceased, in necessary self-defense, if he had reason to believe, and did believe, it was necessary to kill to save his own life,

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or avoid considerable personal harm; but if the defendant himself made the unlawful attack, or if there was a fight upon a sudden quarrel, then the defendant, if he killed the deceased, could not escape on plea of self-defense. He would be guilty of manslaughter, at any rate, and might be guilty of murder, if the facts indicated malice."

The defendant objects to the latter part of the charge, and insists that it is not only not good law, but that it prejudiced his defense. This latter part of the charge, when considered in connection with the former part of the same, appears to be susceptible of this construction only, viz.: That the defendant would be guilty of manslaughter, if, in the absence of malice, he killed the deceased in a fight in which, first, he, the defendant, was the assailant, or, secondly, in a fight arising out of sudden heat, in which he did not strike the first blow.

But one witness testified as to the commencement of the fight in which the fatal blow was given. Several others testified in reference to its progress and termination. The witness who saw the whole transaction differed in his statements from those who saw a part only, as to that part, in this—those who saw the latter part only, stated that the deceased had the defendant against a fence, by the side of the highway, kicking him. The other stated that the whole transaction took place in the public highway, where the defendant pulled the deceased off his horse, whereupon the deceased struck him, and received the fatal stab. If the evidence of those who saw the latter part of the transaction only should prevail, the jury might have inferred that the defendant had retreated, or been pushed to the wall—that is, to the fence—and then, with a pocket-knife, gave the blow which proved fatal.

Whether he had, or had not, a legal right to strike that blow, depended, in the opinion of the Court, upon a question of fact, namely: Were they fighting upon a sudden heat? or was the defendant originally the assailant? If either question should be answered in the affirmative, then the defend-

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ant had no such legal right, although he was thus pushed, according to the instructions given. The instructions asked were based upon the idea that if, at the time of the killing, the defendant had reasonable ground for belief that such act was necessary to save his own life, or prevent grievous bodily harm, he might so act. The origin of the fight is not noticed.

If A, a man of much strength, should, upon the spur of a sudden quarrel, strike B, a weak man, and, following up his advantage, should, in the commission of grievous bodily harm, receive a fatal, but unpremeditated, blow, should B receive the penalty of manslaughter? So if, in a like case, B should strike the first blow with his hand, and A, overstepping the bounds of mere defense, should proceed to commit such harm as should make it necessary for B to strike with a weapon to save his life, would he be guilty of manslaughter in thus slaying A?

One ought not to have brought upon himself the necessity which he sets up in his own defense. 1 Hawk. P. C. p. 82, sec. 22. *Vaiden v. Commonwealth*, 12 Grat. 717. *Haynes v. The State*, 16 Ga. 465. Or, if he has brought it on, he must put into actual exercise his duty of withdrawing from the place; that is, retreating to the wall, before he should be justifiable in striking the fatal blow. *Foster*, 227. *The State v. Hill*, 4 Dev. and Bat. 491. *The State v. Howell*, 9 Ind. 485. And this falling back to "the wall" must be, in good faith, a retreat or flight, and not a mere design to protect himself under the shield of the law. 1 Hawk. P. C. 479, 480. 2 Bishop's Crim. L. 565.

In view of these authorities, the ruling of the Court appears to have been correct in refusing the instruction asked; but it was wrong upon the latter part of the instruction given, in view of the evidence in the case. It was not right to say to the jury, without qualification, that if the defendant made an unlawful attack, or got into a fight with the deceased,

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upon a sudden heat, and slew him in the controversy, he "would be guilty of manslaughter, at any rate."

The qualification of the charge, which we think should have been made, should have been directed to meet the settled principle of law above quoted: namely, giving the accused, under such circumstances, the benefit of his retreat, flight, or withdrawal from the contest, if the jury believed, from the evidence, that such was the fact, although he might have been the aggressor in the first instance.

As this instruction may have misled the jury in determining the value of the evidence given, the judgment will be reversed.

Per Curiam.—Judgment reversed, with orders to the clerk, etc.

John H. Stotsenburg and *Thomas M. Brown*, for the appellant.

John P. Usher, Attorney-General, and *Chambers Y. Patterson*, for the State.

ROCHE v. WASHINGTON.

A contract of marriage, formed in Indiana, between residents of the State of Indiana, to be valid, must conform to the laws of Indiana.

A marriage between a male and female of the *Miami* tribe of Indians, formed according to the customs of the tribe, while the parties to it were residents of Indiana, can not be recognized as a valid marriage under the laws of Indiana.

The *Miami* tribe of Indians is not a nation, or independent people, between which and ourselves the principles and regulations of international law can apply, or be enforced.

APPEAL from the *Huntington* Circuit Court.

Roche v. Washington.

PERKINS, J.—Suit for partition, instituted by *Francis Washington* against *John Roche*. Partition adjudged. Motion for a new trial overruled. Commissioners report partition. Report confirmed. New trial denied. Appeal to this Court. The cause was decided upon the following agreed case:

“It is hereby agreed, by the parties to this action, that the following are the facts of the case: The land in question, of which partition is prayed, was the property of *La-ka-ko-quah*, alias *Jane Richardville*, who died seized of the same in 1857, leaving no children, nor father or mother, but leaving her husband, as hereinafter stated, whose name is *George Washington*, and her sister, *Catharine Richardville*, her brother, *Snap Richardville*, and *Francis Washington*, the plaintiff, who is an only son of her sister, *Ah-tah-pe-tah-neah*, deceased. It is further agreed, that the defendant, *John Roche*, has the title of *George Washington*, *Catharine* and *Snap Richardville*, conveyed to him since the decease of the said *Jane Richardville*. It is further agreed, that all of the foregoing persons, except the defendant, are, or were, *Miami* Indians.

“It is further agreed, that, in the year 1844, the said *George Washington*, according to the manner and custom of marriage in said *Miami* tribe of Indians, was duly married to *Le-qua*, a *Miami* Indian, with whom he lived, residing in *Huntington* county, *Indiana*, where a part of the said *Miami* tribe then and since have resided—that in the year 1846, the said *George Washington* and the said *Le-qua*, according to the manner and custom of divorce in said *Miami* tribe, were duly divorced—that in the same year, 1846, said *Le-qua* removed to *Kansas* territory, where she has since resided, and now resides—that afterward, in the year 1847, said *George Washington*, according to the custom of said tribe of Indians, was married to the said *Ah-tah-pe-tah-neah*, who departed this life in 1852, leaving said *Francis Washington* her only surviving child—that afterward, in 1853, said

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George Washington, according to the custom of said Indian tribe, was married to said *La-ka-ko-quah*, alias *Jane Richardson*, and that the two lived together, and cohabited as man and wife, till her death, at the County of *Huntington*, in 1857, she dying childless.

“It is further agreed, that the Indian custom of marriage requires no ceremony further than the agreement of the parties to live together as husband and wife, the agreement being consummated by living and cohabiting together as such.

“It is further agreed, that the Indian custom of divorce requires no special form of proceeding, other than that the parties disagree, and, by consent, separate, the mother usually taking care of, and receiving the annual payment of the Government to, the children; and that the said customs of marriage and divorce are the ancient, immemorially continued, and present existing customs among all of said tribe of Indians, and the law thereof; and that the same have continued to exist, as their customs and laws, from a period beyond the memory of man.

“J. R. COFFROTH, *Attorney for Defendant.*

“L. P. MILLIGAN, *Attorney for Plaintiff.*”

The question intended to be presented for our decision in this cause, is, whether the Courts of Indiana will hold valid, as marriages, such unions, and as divorces, such separations, as those described in the agreed statement of facts, they having been made under, and being sanctioned by, the laws of the *Miami* tribe of Indians.

It is claimed that, by the law of nations, the Courts of Indiana must uphold Indian marriages. The law of nations, or international law, is mainly of modern origin, growing out of increased commercial and social intercourse, and exists only among civilized states. 1 Kent, p. 1. It is very properly divided by late writers into public and private.

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Public, that which regulates the political intercourse of nations with each other. Private, that which regulates the comity of states in giving effect, in one, to the municipal laws of another, relating to private persons, their contracts, etc.

The first question to be decided is, then, Does a tribe of North American Indians constitute a state? We think not. A state has been defined to be "a people permanently occupying a fixed territory, bound together by common laws, habits, and customs [or by a constitution,] into one body politic, exercising, through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace, and of entering into international relations with other communities." See New Am. Cyclop. vol. 10, p. 360. Wheat. L. of Nations, pp. 53, 54. 1 Kent, 188, 189. But few of the particulars enumerated as constituting a state, exist in a tribe of North American Indians. See, however, *The Cherokee Nation v. Georgia*, 5 Pet. (U. S.) Rep. 1. This the Court judicially takes notice of as matter of general historical knowledge; the Indians are not educated above the condition of nomadic, pastoral tribes, if up to it. Neither, were these tribes conceded to be states or nations, in the political or international sense of the terms, are they civilized.

Civilization, it is true, is a term which covers several states of society; it is relative, and has not a fixed sense; but, in all its applications, it is limited to a state of society above that existing among the Indians of whom we are speaking. It implies an improved and progressive condition of the people, living under an organized government, with systematized labor, individual ownership of the soil, individual accumulations of property, humane and somewhat cultivated manners and customs, the institution of the family, with well-defined and respected domestic and social relations,

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institutions of learning, intellectual activity, etc. We know, historically, that the North American Indians are classed as savage and not as civilized people; and that, in fact, it is problematical whether they are susceptible of civilization.

But, let it be admitted that the *Miami* tribe of Indians constitutes an international political State, and that it is a civilized one, still the State of *Indiana* is not bound by international comity to give effect, in her courts, to all the laws and customs of such State; but only to such as are not repugnant to her own laws and policy. 1 Ind. 24.

Laws giving effect to contracts of marriage are not repugnant to the laws of *Indiana*, and the proposition is established, as a general one, in private international law, that an actual marriage, valid in the country where celebrated, will, not as upon a claim of right, but by courtesy, be given effect to in other States, though not celebrated by the forms nor evidenced in the mode prescribed for marriages in such other States. If, then, in the case at bar, an actual marriage took place between *Jane Richardville* and *George Washington*, there could be no objection to its being upheld in the courts of this State, though celebrated among an uncivilized tribe of Indians.

What, then, constitutes the thing called a marriage? what is it in the eye of the *jus gentium*? It is the union of one man and one woman, "so long as they both shall live," to the exclusion of all others, by an obligation which, during that time, the parties can not, of their own volition and act, dissolve, but which can be dissolved only by authority of the State. Nothing short of this is a marriage. And nothing short of this is meant, when it is said, that marriages, valid where made, will be upheld in other States. *Noel v. Ewing*, 9 Ind. 37. Story's Conflict of Laws, chap. 5. Wheaton's Law of Nations, 137. See *Reynolds v. Reynolds*, 8 Allen (Mass.) Rep. 605. From what has been said, it is manifest that the union between *Jane* and *George*, described

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in the statement of facts in the case at bar, was not a marriage, according to the law of any civilized nation, but simply and exactly a contract and state of concubinage. See Cobb. on Slavery, 245, note 4. *The State v. Samuel*, 2 Dev. and Bat. (N. C.) Rep. 177. But, suppose the union had been such as to constitute marriage, according to the *jus gentium*, and which the courts of this State would have upheld as such, it might not still have followed, as a consequence, that the husband would have inherited, from the wife, her real estate. The marriage is one thing, and the incidents, the legal rights, and consequences attaching upon marriage, are another; and these may be different as to real and personal property. 2 Kent, p. 93, *et seq.* Marriage, in different countries, is followed by different property rights. In the *Miami* nation, or tribe of Indians, marriage, supposing we concede their unions of sexes to be such, is not followed by a right in either party, by the law of the tribe, to inherit real estate from the other; for the Indians, by their laws, neither in their tribal capacity, nor individually, owned any real estate. It is a kind of property unknown to them. They simply hold vaguely-defined territory, for use in hunting, fishing, etc., and they never assumed to, and could not convey, the fee, to any one. That belonged, first, to Great Britain, as the discovering nation, and to the United States afterward, by succession to Great Britain; and it is under our laws only that any individual among these Indians ever obtained, conveyed, or inherited real estate. See *Fellows v. Denniston*, 23 N. Y. Rep. 420. *The Cherokee Nation v. Georgia*, 5 Pet. (U. S.) Rep. 1. This is the doctrine of international law held by civilized States, and acted upon without consulting the Indians. It is based or justified on the ground that the Indians never cultivated the soil. But the case does not turn on any of the foregoing points, and they need not, therefore, be regarded as decided. See, on the general subject, *Dale v. Irish*, 2 Barb. 639. *Wall v. Wil-*

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liamson, 8 Ala. 48. 11 *Id.* 826, and 10 *Id.* 630. Also, *Jones v. Laney*, 2 Texas, 342, and the cases in the Supreme Court of the United States, cited in *Cush. Dig.* 240.

A treaty, however, we may remark, may be made between a government and an association of persons not constituting an independent government. The Constitution of the United States authorizes our government to treat with foreign *nations*, and to regulate affairs with *states* and *Indian tribes*. We know, as a part of the law of the land, and the history of our State, that the last treaty between the *Miami* tribe of Indians, located in Indiana, and the United States, was in 1840; that the tribe then agreed to remove from Indiana to West of the *Mississippi* river; that, in 1846, the agreement was executed, the chiefs at that time extinguishing their council fires upon the Wabash, and, accompanied by most of the living members of their tribe, departing for their newly assigned and distant home. The sovereignty of the tribe, so far as it possessed sovereignty, its jurisdictional power, so far as it possessed such over persons and property in Indiana, disappeared with the light of its council fires, and departed to the new seat of the tribe.

Now, it is true as a general proposition, that the laws of a nation are operative only within the limits of the territory over which the jurisdiction of the nation extends. They do not, as a general proposition, follow the individuals of such nation into the jurisdictional limits of another nation, so as to attach to acts done in such other nation. Hence, if citizens of Great Britain, of China, or of Africa, contract marriage in Indiana, that contract, to be valid, must conform to the laws of Indiana. 1 Bright's *Husband and Wife*, p. 8. 1 Greenleaf's *Ev.*, sec. 545. For exceptions to the general proposition above stated, see *Wheaton's Law of Nations*, p. 132, third edition. The marriage, in the case at bar, was contracted in Indiana, between *Miami* Indians who did not accompany the tribe to the West, but remained to live

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among our people; and it was contracted after all territorial jurisdiction of the tribe had ceased in the State, and after the tribe itself, with its government, had disappeared from our borders. The marriage, therefore, was clearly to be tested by the law of Indiana; certainly so, when it came in question in our own tribunals.

Per Curiam. — The judgment below is affirmed, with costs.

John R. Coffroth, for the appellant.

L. P. Milligan, for the appellee.



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GREENLEE v. DAVIS and Another.

The word "ancestor," in section 114, p. 436, R. S. 1843, must be construed to embrace all persons from whom a title by descent could be derived, under any circumstances; that is, to be synonymous with *kindred*.

APPEAL from the *Tippecanoe* Circuit Court.

DAVISON, J.—The appellant, who was the plaintiff, sued *Davis* and *Cassman*, for the partition of real estate. Demurrer to the complaint sustained, and final judgment for the defendants.

The following are conceded to be the facts of the case, as alleged in the complaint:

On the 16th day of June, 1827, one *Abraham Burnett* made his will, by which he devised to his nephew, *Richard Davis*, a section of land, known as Section No. 6, in the *Burnett* reservation at the mouth of the *Tippecanoe* river, in *Tippecanoe* county, *Indiana*. By this will the said *Richard Davis* became the owner, in fee simple, on the death of his uncle, the said *Abraham Burnett*, which occurred shortly after the execution of his will, and prior to the 12th day

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of May, 1828. *Richard Davis* was the son of one *John H. Davis* and his wife, who was *Nancy Davis*, a sister of *Abraham Burnett*. *Nancy Davis* survived her brother, and, after his death, had issue, by her said husband, *William B. Davis*. Prior to the marriage of *John H. Davis* to the said *Nancy*, he had issue a son, *John H. Davis*, by a former marriage. *Nancy Davis* died some time after her brother *Abraham*, leaving, her surviving, her two sons, the said *Richard* and *William B. Davis*; and, in the year 1847, the said *Richard* died, intestate, seized of said section of land in fee, and left, him surviving, as his only heirs at law, the said *William B. Davis*, his brother of whole blood, and the said *John H. Davis*, the brother of the half blood. Sometime in May, 1857, the said half-brother, *John H. Davis*, made his will, and shortly afterward, prior to June 10, 1857, died. His will was duly proven; and, by its provision, after devising some fifty acres of said Section No. 6 to *Jaorigim Cassman*, he makes the appellant his residuary devisee as to that section and some other of his estate. The only title, if any, *John H. Davis* had in said Section No. 6, was derived by descent from his half-brother, *Richard Davis*; and if he had any inheritance in said section, it embraced the equal, undivided half of it, as co-heir with *William B. Davis*; *Richard's* brother of the whole blood. The facts above stated appear in the complaint, by which the appellant seeks to have partition of said section so as to set off to him, in severalty, the portion which, he insists, belongs to him as the residuary devisee under *John H. Davis's* will.

The only question to settle is: Did *John H. Davis*, the half blood brother of *Richard Davis*, the intestate, inherit, as to the land devised by *Abraham Burnett*, equally with *William B. Davis*, *Richard's* brother of the whole blood? An act, in force when the intestate died, contains this provision: "Kindred of the half blood, and their descendants, shall inherit equally with those of the whole blood in equal

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degree of consanguinity to the intestate, unless the inheritance shall have come to the intestate by descent, devise, or, gift, of some of his ancestors; in which case, such kindred of the half blood, and their descendants, shall not inherit, except they also be of the blood of such ancestor; but if, in any such case, there be no relatives of the whole blood, in equal or nearer degree of consanguinity to such intestate, nor their descendants, entitled to take such inheritance, then such kindred of the intestate, of the half blood, and their descendants, shall take the same, as if they were of the whole blood." R. S. 1843, p. 436, sec. 114.

Was *Abraham Burnett*, the devisor, the ancestor of his nephew, *Richard Davis*, the intestate, within the meaning of the term "ancestor," as used in the provision just recited? If he was, *John H. Davis* did not inherit the land in question from the intestate, because, in view of the facts alleged, he was not "of the blood of such ancestor." It is, however, argued that, as *Nancy Davis*, the sister of *Abraham Burnett*, and mother of *Richard Davis*, was living at the time of *Burnett's* death, *Richard* was not the heir of *Burnett*, could not, therefore, have inherited any portion of his estate, and not being such heir, *Burnett* was not his, *Richard's*, ancestor, because the word "ancestor," in the connection in which it is used in the statute, is "the correlative of heir." While, on the other hand, it is insisted that that word should not be confined in its signification "to those from whom the devisee, or donee, would have inherited, as heir, under the circumstances as existing;" but that "it embraces all from whom a title, by descent, could be derived under any circumstances."

The latter position seems to be correct. The intent of the statute must govern its construction; and, from the whole enactment, it may be readily inferred that the legislature did not mean to employ the word "ancestor" in its usually defined meaning: but to use it as synonymous with kindred.

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Richard Davis was of the blood of his uncle, *Abraham Burnett*, from whom he derived the estate by devise, and it is enough to meet the intention of the law-maker, if, in the absence of a nearer heir, he could have inherited the same estate. And, being thus of the blood of his uncle, from whom, in a given case he could have inherited, it follows, that *John H. Davis*, not being of the same blood, could not inherit the estate from *Richard*, his half-brother. *Brewster v. Benedict*, 14 Ohio, 368. This authority, though not directly in point, enunciates a principle which accords with the view we have taken. See, also, *Pricket v. Parker*, 28 Ohio, 394.

Per Curiam.—The judgment is affirmed, with costs.

John Pettit, Samuel A. Huff, W. F. La Rue, and Behm and Taylor, for the appellant.

Robert Jones, for the appellees.

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FAIRMAN'S Administrator v. HEATH and Others.

Where a mortgage is given upon real estate, to secure the payment of a debt, and the mortgagee, by the terms of the mortgage, has acquired the right only to look to the land for payment, he could transmit to another, by way of subrogation, no greater right than he had acquired.

APPEAL from the Tippecanoe Common Pleas.

WORDEN, J.—This was an application by the appellees, as creditors of said estate, for a distribution, or payment of funds, upon their respective claims, *pro rata*. The application was resisted by the administrator, but the order of payment was made, and from that order the administrator appeals.

The material facts are as follow: The administrator had

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paid into Court, as funds belonging to said estate, the sum of four hundred and eighty dollars seventy-one cents, leaving a balance in his hands of one hundred and seventy-nine dollars, enough to pay the expenses of administration up to that time. The claims of the applicants had been duly allowed, and amounted to four hundred and ninety-eight dollars sixty-nine cents, and embraced all the claims filed, or known, against said estate, except a certain mortgage hereinafter mentioned. *Fairman*, the deceased, died in the year 1853, leaving a widow and several children, and real estate in *Tippecanoe* county, of the value of between twelve and fifteen thousand dollars. In 1856, at the suit of the widow and some of the children, partition of the real estate was made among them. In the year 1839, *Fairman* executed to *N. B. Palmer*, Superintendent, etc., for the use of the *College Fund of Indiana*, a mortgage on a portion of the land thus parted, to secure four hundred dollars, payable in five years, with nine per cent. interest. This mortgage, though duly recorded, was wholly unknown to the heirs and administrator of the deceased, at the time of the partition, except such constructive knowledge as arises from the record.

The land thus mortgaged was set apart to two of the heirs of the deceased, without taking into consideration the incumbrance.

In the year 1858, the auditor and treasurer of State made a sale of the land thus mortgaged, to *Daniel Mace*, and, of the proceeds, applied five hundred and eighty-nine dollars and forty cents, the amount then due thereon, to the liquidation of the mortgage. A suit was afterward instituted by those to whom the land had been set apart, against said purchaser, to set aside said sale, in the *Tippecanoe* Circuit Court, but was there decided against them, but appealed to this Court, where it was pending at the time of the trial of this cause below.

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It may also be observed, that neither the State, nor those to whom the land in question had been set off, had ever filed any claim in the Court below against the estate of the deceased; indeed, it does not appear that the State had any personal claim, but the right only to look to the mortgaged premises, as there does not appear to have been any note or other agreement to pay the money, nor does the mortgage contain any covenant to that effect.

The order for *pro rata* payment was in substantial accordance with the provisions of the statute, (2 R. S. 1852, p. 274, sec. 12,) and is right, unless wrong on the following ground, assumed by the appellant, viz.: That the mortgage was a preferred claim, and that if the sale should be set aside, the amount of it would be due the State; and if the sale should be affirmed, the heirs to whom the land had been set apart would be subrogated to the rights of the State, and would be entitled to hold it as a preferred claim against the estate; so that, in either event, the administrator should hold the money, in order to apply it accordingly, when the suit mentioned should be determined in this Court.

There is nothing in the case showing the invalidity of the sale made by the State officers of the land in question. Indeed, the case mentioned as having been appealed to this Court, has been decided, affirming the sale. *Vide Bansemer et al. v. Mace et al.*, May term, 1862, 18 Ind. 27.

The sale of the land being valid, and having brought more than enough to pay the debt, the mortgage is liquidated, so the State has no claim against the estate of the deceased.

The heirs to whom the land in question was set off can not become creditors of the estate by reason of the sale of the land to pay the mortgage, either by subrogation or on any other principle. Whatever might be the law had there been an obligation on the part of the deceased to pay the money secured by the mortgage, which could have been enforced against him personally, there is nothing in the case.

Ewald and Others v. Coleman.

before us to which the heirs could be subrogated that would furnish a right of action against the estate. We have seen that the State, by her mortgage, acquired the right only to look to the land for payment; and such right only, if any, could be acquired or transmitted by subrogation.

The descent was cast upon the heirs of the deceased, subject to incumbrances and the payment of his debts, and the partition having been made before the debts were paid and incumbrances removed, the remedy of those losing their share by reason of the incumbrance, if they have any, which it is presumed, though not decided, they have, is against their co-heirs for a re-partition or other relief.

Per Curiam.—The judgment below is affirmed, with costs, to be levied of the assets, etc.

George Gardner, for the appellants.

D. P. Vinton and John L. Miller, for the appellees.

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Ewald and Others v. COLEMAN.

It is improper for a sheriff, in selling land on execution, to announce that he will sell only a conditional estate, that may be redeemed, in a year, because the tendency of such statement is to injure the owner of the real estate, by depreciating its value.

APPEAL from the Lawrence Common Pleas.

Per Curiam.—We think the order appealed from, in this case, was an injustice, as in the case of *Flagg v. Sloan*, and not a mere restraining order, as in *The Cincinnati, etc., Co. v. Huncheon*, 16 Ind., pp. 432, 436. Hence, an appeal would lie in the case. It enjoined the execution of a deed to land till the validity of a sheriff's sale could be tested in the pending suit. We think, also, the complaint, on its face, makes a case for relief. It shows that when the sheriff offered the

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property for sale he announced that he should only sell a conditional estate, that might be redeemed in a year; that this was all he did sell; and for that intent he gave a certificate instead of a deed, for the fee simple; that, in consequence of this course, which, we must take it, the execution-plaintiffs sanctioned, property worth six thousand dollars sold for about three hundred dollars, and which, otherwise, would have sold for three thousand dollars.

The temporary injunction is affirmed, with costs, and the cause will proceed below, to answer, issue, and trial.

Carlton and Parks, for the appellant.

William T. Otto and Thomas R. Cobb, for the appellee.

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LAWSHÉ v. MCCLAIN.

Where a judgment is rendered after a default, a motion to set aside the default should precede an appeal to this Court.

APPEAL from the *Grant* Circuit Court.

Per Curiam.—This was an action by *McClain* against *Lawshe*, to foreclose a mortgage. The record shows that the defendant was duly served with process, was called, had failed to appear, and was regularly defaulted, and that judgment, by default, had been regularly entered against him. But no motion appears to have been made, in the lower Court, to set aside the default. Hence the case, on appeal, is not properly in this Court. *Blair v. Davis*, 9 Ind. 236.

The appeal is dismissed, with costs.

H. D. Thompson and W. R. Pierse, for the appellant.

Wood v. Kennedy.

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The interest law of 1861, so far as it relieves the promisor from the penalties, or consequences in the nature of penalties, imposed by the law of 1852, on the same subject, is not a law impairing the obligation of the terms of the contract, but rather enforcing and validating them.

Usury paid upon a debt, evidenced first by a note, made under the law of 1852, on the subject of interest, and afterward by a note given by way of renewal, under the law of 1861, may be collected under the latter law, as both notes merely evidenced the same contract.

APPEAL from the *Wayne* Common Pleas.

PERKINS, J.—Suit by *Kennedy* against *Wood*, upon a promissory note of this tenor:

“One day after date, I promise to pay to *John Kennedy* the sum of three hundred dollars, for value received of him, this 9th day of September, 1861. **VALENTINE WOOD.**”

The defendant answered, as to seventy-eight dollars and thirty-six cents, part and parcel of the sum of money in the complaint mentioned, that, on the 28th day of February, 1855, at the county, etc., the defendant was indebted to the plaintiff in the sum of three hundred dollars, then due, and that the plaintiff did there exact, for the use and forbearance of the same, ten per cent. per annum interest; and that from the said 28th of February, 1855, to the 9th day of September, 1861, being six years, six months, and eleven days, the defendant paid annually to the plaintiff, and the plaintiff corruptly and usuriously exacted and received, ten per cent. per annum interest, making, in all, one hundred and ninety-five dollars and ninety-one cents, being seventy-eight dollars and thirty-six cents excess over and above legal interest; and further, that the note sued on was given as evidence of said three hundred dollars indebtedness, and for no other consideration: and the defendant asks that he be credited, in the

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finding of the amount due on the notes, with the sum of usurious interest which he has paid on that debt, and that the action of the plaintiff, as to such sum, be barred.

A demurrer was sustained to this answer, and the plaintiff had judgment for the full amount of the note.

The transaction set up in the answer extends through a period covered, in parts, by two statutes on the subject of interest. The statute of 1852, on the subject of interest on money, is entirely repealed by the act on that subject of March 7th, 1861. See 2 G. & H. p. 657, and note.

The statute of 1861 covers the whole subject-matter of that of 1852, but makes different provisions upon it, and would, therefore, work a repeal of the latter by implication, did it not contain an express repealing clause. *The President, etc. v. Bradshaw*, 6 Ind. 146. But the act of 1861 contains a clause expressly repealing the civil and criminal acts of 1852, named in the act of 1861; and further, repealing generally all other acts inconsistent with that of 1861, if any other such acts were in existence. This whole repealing section, in fact, but declares simply the legal effect of the later statute. But the repeal and re-enactment of a statute by the same act does not have the effect of repealing the statute. And, the repeal and re-enactment of a section of a statute by the same act does not work a repeal of such section. Hence, in this case, as the act of 1852 declared that the rate of interest should be six per cent., and the repealing act of 1861 also declared, re-enacted, that the rate of interest should be six per cent., it may be stated that that provision has been continuous law; that six per cent. has been, at all times, since 1852 till this day, the legal rate of interest; and the excess exacted beyond that has been usurious. And the question now is: What has been, and what is now, the consequence of exacting usurious interest?

Under the act of 1852, the party receiving usurious interest was:

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1. Liable to indictment.
2. When he sued to recover on his usurious contract, he had the cost of his suit to pay.
3. He could not recover any interest that might be due, according to the terms of the contract, at the commencement of the suit, or time of judgment.
4. The interest that had been paid was deducted from the principal due, at the rendition of judgment.

Under the statute of 1861, the plaintiff can not be:

1. Indicted for usury.
2. He recovers his costs in a civil suit on the usurious contract.
3. He may recover six per cent. interest.
4. The amount of interest over six per cent. that has been paid, that is, the usury, may be deducted from the sum otherwise due the plaintiff at the rendition of judgment.

The repeal of a statute inflicting penalties relieves unpenalized parties who have incurred the penalties from punishment. *Thompson v. Bassett*, 5 Ind. 585. The forfeiture of interest, on account of usury, is in the nature of a penalty; hence the repeal of the statute creating the forfeiture will relieve from it to the extent of the repeal.

The change made in the interest law, then, by the act of 1861, is mainly in relieving from penalties, or consequences in the nature of penalties, and is not one impairing the obligation of the terms of the contract, but rather enforcing, or validating them. In such cases, the law in force at the time the remedy is sought upon the contract, governs. See *Maynes v. Moore*, 16 Ind. p. 124.

It may be observed, at this point, that the law of 1852 and the law of 1861 are alike in this, at all events, that, by both, illegal interest, previously paid on a contract, can be, in effect, recovered back, can be deducted from the amount for which judgment is to be rendered. To this extent, the law of 1861 works no change in that of 1852. But the act

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of 1861 does not allow legal interest paid to be deducted, as does that of 1852. It may be further observed, that in the interest law of 1861 are incorporated two principles of English law, viz.: The rule in equity, of that law, that the principal and legal interest must be paid; and the rule at common law, that illegal interest paid, can be recovered back. See *Smead v. Green*, 5 Ind. 308. Blackf. 2d ed. 365, 384, note.

In the case at bar, then, had *Wood*, given his note to *Kennedy*, in 1855, for three hundred dollars, then due, and had he, since that time, from year to year, paid ten per cent. interest for the use and forbearance of the three hundred dollars, down to the period of this suit, the payment would have embraced usurious interest, and in this suit upon the note, (supposing it to have been given in 1855,) the amount of the usury thus paid might be deducted. But the note was not given in 1855; it was not given till after the act of 1861, and the question is: Was the giving of the note a new contract, which alone governed as to the rights of the parties, or was it simply evidence of the indebtedness, which had been a continuous one since 1855, and still continued?

A money indebtedness may rest in parol, or it may be evidenced by writing. So, a contract for interest may be by parol or in writing. There is nothing in the interest law, nor in the statute of frauds, to prevent this. And either of those contracts may rest for a time in parol, and then be reduced to writing.

In the case at bar, the note says nothing about interest; hence, interest on it might be made the subject of a separate contract, and by parol. A mere verbal contract and unsealed written contract are of equal dignity at common law.

If a note had been given in 1855 for the three hundred dollars, and had been simply renewed in 1861, both notes would have evidenced the same contract, the same indebtedness. Why may not, then, the parol contract of 1855, evidenced by a

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note in 1861, be the same continuous contract? What is this suit for? It is to recover three hundred dollars. What three hundred dollars? Why, certainly the same three hundred dollars owed in 1855, and evidenced by note in 1861. Well, on what three hundred dollars is it that ten per cent. interest has been paid? Certainly the same three hundred dollars sued for. Then the usury should come out.

Per Curiam.—The judgment is reversed, with costs; cause remanded, etc.

John Yaryan, for the appellant.

W. A. Bickle and C. H. Burchenal, for the appellee.

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Under the laws of Indiana, a married woman may devise her separate property, and it is not necessary that the husband should concur in, or be in any way a party to, the will of his wife disposing of her separate real estate.

As to what constitutes a correct instruction from the Court to the jury, in a case in which the validity of a will is attacked, on the ground that it was procured by fraud, duress, or undue influence, the reader is referred to the opinion at length.

Where a party requests, at the proper time, that the jury shall be required to return answers to special interrogatories, it is the duty of the Court to propound to them such interrogatories as shall be applicable to, and embrace the issues and legitimate evidence in the cause, so as not to withdraw from their consideration any part of either.

If the answers of the jury to any such interrogatories are not appropriately responsive thereto, there should be a motion in the Court below to make them more direct, or, in some other proper mode, to remedy such defect, or such errors will not be available in this Court.

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It is the imperative duty of the Court, at the request of either party, to direct the jury to find a special verdict.

But, if such request is made, the party can not at the same time require that interrogatories shall be propounded to, and answered by, the jury, in the event of a general verdict being returned; and if he make the latter request, the demand for a special verdict will be thereby waived.

In an action to set aside the will of a married woman, because it was procured by fraud, duress, or undue influence, it is error to admit testimony designed to prove that a part of the property disposed of by the will was purchased and given to the testatrix by her husband, because the will could only operate upon such property as belonged to the testatrix, both in fact and law.

APPEAL from the *Franklin* Circuit Court.

HANNA, J.—*Emily H. Noble*, wife of *James Noble*, died, leaving her husband and two children, on the 26th day of October, 1859, and an instrument purporting to be a will. This was a proceeding to test the validity of said instrument, as a will.

It is alleged that she, being a married woman, had no power to make a will; and if she had, that the same must be exercised with the consent of her husband, as real estate was included. That said will was obtained through coercion, compulsion, and the undue influence of defendants, etc.

It will be observed that the instrument was executed after the enactment of the statute of 1859, (Acts, 1859, p. 245,) which professed to explain the intention of the legislature in the enactment of 1852. 2 R. S., p. 308, chap. 2, prescribing "who may make a will," etc., namely, "all persons, except infants, and persons of unsound mind," etc. The act of 1859 declares, that it was the intention, by said act of 1852, to confer upon married women the right to execute wills, and that Courts should so construe said act. Passing over, for the present, the said act, and disregarding the questionable taste of several passages in it, we will

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consider that of 1852 alone, and in connection with previous legislation upon the same subject.

The persons that may devise are named, that is, "all persons." The statute does not stop at declaring that all persons shall have that power, but proceeds to enumerate the exceptions, to-wit: "infants, and persons of unsound mind." Now, as there are other provisions in the code, enacted by the same law-makers, authorizing married women to hold property, both real and personal, (1 R. S., p. 321,) separate from their husbands, and to sue alone in matters concerning the same, (2 *Id.* 28,) the question naturally arises, whether the term "all persons" will include them? We need not pause to determine the effect of such a statute, declaring broadly that "all persons" shall have this power, for it is only necessary to consider this in connection with the exceptions. Can we, in view of the statutes quoted, supply or presume an exception not named, because, in some matters, a disability still exists, and, in this matter, formerly existed? In other words, shall we declare that persons, other than those named in said statute as being disqualified, are laboring under disability?

Here is a broad legislative declaration of the possession of a right, or of the intention of that body to confer such right; it matters not, for the purpose of the argument, which; and the same legislative act also contains, or expresses, a particular intention, incompatible with the declared possession of such right, or intention to confer it. This latter should be treated as an exception, and defeats the general legislation as to the persons designated in said exception. More than that, does it not preclude any construction of said statute by which persons, other than those designated in said exception, shall be excluded from the exercise of the power declared to exist, or conferred by the general terms of said act? *R. v. Archbishop of Armagh*, 8 Mod. 8. *Churchill v. Crease*, 5 Bing. 180. *Torrington*

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v. *Hargraves*, *Id.* 492. Sedg. on Constitution and Statute Law, p. 39.

In looking to the question, whether such is the proper interpretation of said act, we are, perhaps, at liberty to advert to the disabilities of married women, in respect to making a will, contained in the previously existing laws. *People v. Utica Ins. Co.*, 15 Johns. 358, 80. Bl. Com., vol. 1, p. 87. 7 Conn. 457. The code of 1843, p. 485, contained an act that "All persons, except married women, infants, idiots, and persons of unsound mind, may devise," etc. The disability as to married women is not, in express words, carried forward in the legislation of 1852, and why not? In searching for an answer to that question, we find that the disability of the wife was, by the same law-makers, by contemporaneous legislation, removed, so as to enable her to hold and control property, title to which should be acquired in certain designated modes. What should become of that separate property at her death? Was it not competent for the law-makers who gave her control of it during her life, also to authorize her to dispose of it, or any part of it, after her death?

But we need not pursue this investigation, based alone upon the statute or statutes of 1852, and those preceding it; for the act of 1852, prescribing "who may make a will," has since, as we have mentioned, received the exposition of a subsequent legislative body, a successor of the one that enacted it. Now, while it is true, that the power of expounding the law belongs to the judiciary alone, *Municipality No. I v. Wheeler*, 10 Louis., p. 747, and while it is, perhaps, in most cases, also true, that an act declaring the true intent of a previous act does not control the judiciary in deciding upon the true construction of the first act; yet we suppose it is within the power of legitimate legislation to declare the meaning of the act in reference to cases arising after the said second act shall take effect. This

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is termed legislative exposition, by subsequent legislative bodies. *Sedg.*, p. 252.

This will was made after the enactment of 1859, and was within the power of the testatrix, as to such parts of her property as she was authorized to dispose of in that way.

We do not think there is any thing in the objection, that the will was made in the absence of the husband of the testatrix. It is not such a conveyance as is contemplated by the act of 1852, p. 1; R. S., p. 321, forbidding conveyances and incumbrances, etc. *Mason v. Simmes*, at this term.

As to the third point, concerning the validity of the will, arising out of matters of fact connected with its execution, it may be said, generally, that the evidence as to the questions of fact involved, is very conflicting; and upon questions arising out of the weight or value of that evidence alone, we may not disturb the determination arrived at, if the legal principles involved in the controversy were correctly ruled by the Court.

This leads to the examination of the rulings on the trial.

The statute is, that the validity of a will may be contested on account of the "unsoundness of mind of the testator, the undue execution of the will, that the same was executed under duress, or was obtained by fraud, or any other valid objection to its validity." 2 R. S. 318.

After recitals in the complaint, of the possession of property and absence of the husband of said testatrix, and the extreme youth of the children, the sickness and feebleness, mental and physical, of said testatrix, the fact that the defendants, *Enos* and wife, resided with her, etc., it is charged, that the defendants, with the intention to cheat and defraud plaintiffs, and to obtain a portion of said estate, etc., persuaded and coerced the said *Emily*, while thus weak and feeble, and, through fear and threats, induced her to make a will, and to bequeath to said *Magdalene Enos* large sums," etc.

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Answer. Denial, and affirmation of the validity of said will. Jury trial, in Common Pleas, verdict and judgment against the validity of the will. Appeal to Circuit Court, jury trial, verdict and judgment sustaining the will.

The instructions asked by the appellants were refused. The first attempted to define fraud and its consequences, and the second was as follows :

“ So if one party exercises an undue influence over another, by this phrase, *undue influence*, is not meant that influence which is obtained by modest persuasion or arguments addressed to the understanding, or by mere appeals to the affections, but it means an influence obtained either by flattery, or by excessive importunity, or by threats, or in some other mode by which a dominion or control is acquired over the mind or will of one person by another, thereby destroying his free agency, and constraining or inducing him to do, against his free will, what he is unable to refuse.”

The instruction given, bearing upon this point, is as follows:

“ The plaintiffs charge, that the will named in their complaint was obtained by duress or by fraud. Should you find that the will was made under duress or fraud, you should find for the plaintiff. Duress means, in a case of this kind, a threat to take the life or limb of the testatrix, or do her some great bodily harm. Fraud means, that some deceit, trick, deception, or artifice was perpetrated upon the credulity of the testatrix, which deceived her, and induced her to make her will contrary to her real instructions.”

It is insisted, that the first part of the charge given limited the investigation by the jury to acts of duress and fraud alone, and was calculated to mislead them as to their right, under the statute, upon the issues and the evidence, to inquire as to whether the execution of the will was procured by the defendants, by any other undue means; and that, therefore, the part of the charge, asked and refused, and above quoted, should have been given.

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It will be observed that the language used in the charge given, is nearer that used in the statute than that employed by plaintiffs in alleging the means used to procure the execution of the will; which is, that defendants persuaded and coerced, etc., and through fear and threats, induced, etc. It will be further observed, that the charge proceeds to define what the Court meant by the words fraud and duress. Do either of those terms, as used and explained by the Court, include acts of undue persuasion or coercion, if such were proved, by which the testatrix was, through fear and threats, induced to execute the will?

For instance, there was evidence tending to show that the testatrix was the illegitimate daughter of the defendant, Mrs. Enos, and that she locked the testatrix "in a room, and made her swear, on a Bible, that she would not let Noble have any of her money;" and that the so-called "oath greatly troubled her." Would the jury consider that evidence under the charge as given?

Duress, as defined by law writers, means an actual or threatened violence, or restraint of a man's person, contrary to law, to compel him to enter into a contract, or to discharge one. Bouv. L. Dict. Blackstone says there may be two kinds of duress: that which is consequent upon a loss of liberty by imprisonment, or that which operates upon the mind so as to cause fear of loss of life, or limb, or fear of mayhem. 1 Bl. Com. 181-6. Four instances are enumerated by Lord Coke, in which a man may avoid his acts. 1st. When brought about by fear of loss of life. 2d. Of member. 3d. Of mayhem. 4th. Of imprisonment.

We need not critically examine and compare the definition thus given by law writers, and that given in this case by the Court, to see if they agree, but taking that given by the Court as controlling, the question is: Whether the means charged in the complaint to have been used are included in it? As it will not vitiate a will to show that it

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was procured by honest persuasion, (*O'Neall v. Farr*, 1 Rich. S. C. 80. 1 B. Mon. 351. 17 Geor. 364. 17 Barb. 236) but would to procure it by coercion; and, as these are the means charged to have been used to such a degree as to induce the testatrix, through fear and threats, to execute the will, it seems to us, from the construction of the sentence, that the fear is charged as the result of the persuasion, and the coercion as following the threats. Fear, in reference to crimes, is said to be dread, consciousness of approaching danger. 2 Burr. 71-90. 2 East, P. C. 718. By Webster it is defined to be "an apprehension of danger; to feel anxiety on account of some expected evil."

In view of the pleadings and evidence in this case, we are of opinion that the term duress, as limited by the Court, would not sufficiently present to the jury the questions arising in the case.

Fraud is said to be any trick, deception, or artifice employed by one person to circumvent, cheat, or deceive, so as to induce another to fall into an error, or to detain him in it, etc. Story's Eq. Jur., sec. 186. Bouv. L. Dict.

It has been held, that there may be great and overruling importunity, and undue influence, without fraud, which ought to have the effect to avoid a will. *Calvert v. Davis*, 5 Gill and Johns. 301. 1 Jar. on Wills, 39.

It is manifest that this term will not include the acts complained of. It has been held, that there is a manifest distinction between control and undue influence. "Control is more easily capable of a description approaching to a definition, because it necessarily imparts something of the nature of duress or fear." *Stulz v. Schaeffle*, 18 Eng. L. and E. 579.

We conclude, therefore, that the instruction given was wrong; but whether that asked was right or not, we have not strictly examined; but would feel inclined to think, from the very slight consideration we have given it, that some of the terms used in it would not necessarily imply

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that a resort had been had to undue means to obtain the execution of the will. *Jar. on Wills*, 39, as to flattery.

The appellants asked the Court to instruct as follows, which was refused:

“The plaintiffs ask the Court to require the jury to find specially upon all the issues of fact; and should they render a general verdict, the jury will find upon the following special questions:

“1st. Was said will procured by the fraud of the defendants, or either of them?

“2d. Was said will procured by undue influence exerted over the said testatrix by defendants, or either of them?

“3d. Was said will procured by threats made use of by the defendants, or either of them?

“4th. Was said will procured by coercion, or compulsion of defendants, or either of them?

“5th. Was said will executed under duress?”

The Court, in lieu thereof, required the jury to answer the following interrogatories. The answers are also set forth:

“1st. Was said will made by the fraud of the defendants, or either of them?” “No: not at the time of making the will.”

“2d. Was Mrs. Noble under duress when she executed the will in controversy?” “No.”

“We, the jury, find for the defendants.”

It will be observed that the phraseology of the first and fifth questions, of those asked, is somewhat different from that employed in those used, and which are directed to the same points of inquiry.

It is contended, by the appellants, that dropping out the word “procured” from the first question, and substituting the word “made,” was calculated to mislead the jury; and that the language employed in the second question propounded, was calculated to, and did so mislead the jury as

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to confine them to the inquiry as to duress used at the precise time of the execution of the will.

There is not such an essential difference between the first interrogatory asked, and that propounded, as would make the ruling error in refusing the one and giving the other. The jury must have arrived at substantially the same conclusion as to either.

We are apprehensive that the second question propounded was of such a character as would mislead the jury, in this, that they would consider themselves bound down thereby to too narrow a margin in their inquiry as to whether the testatrix was under duress. See 5 Gill and Johns. 303. 20 Penn. State Rep. 329.

It is insisted that the precise points covered by the inquiries numbered two, three, and four are not included in those propounded. The great volume of evidence given by each party was directed to these questions. Should they, in addition to those presented, have been propounded in that form? This question is anticipated in what has been already said in reference to the instruction to the jury. If that instruction was wrong—and we have said it was—then the ruling in refusing these interrogatories was also wrong.

It is urged that the answer of the jury to the first question propounded by the Court is not responsive thereto. No motion was made to require them to make it more direct, nor to set it aside. This should have been done in some form.

It will be recollected that the appellants asked the Court to require the jury to find specially upon all the issues of fact; and it is now urged that the failure to do so was error. The Code, 2d vol., p. 114, provides that verdicts are either general or special; and that a special verdict is that by which the jury find the facts only; that the jury may, unless otherwise directed by the Court, find either a general or special verdict; “but the Court shall, at the request of either

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party, direct them to give a special verdict, in writing, upon all or any of the issues." In addition, there is also the provision for special interrogatories.

This statute appears to be imperative, that it is the duty of the Court, at the request of either party, to direct the jury to find a special verdict. *Bird v. Lanius*, 7 Ind., p. 621. But if such a request is made, the party can not also accompany it with a requisition that interrogatories shall be propounded, to be answered in the event of a general verdict being returned; or, if he does, it operates as a waiver of the request that a special verdict shall be found.

A question is raised upon the refusal to admit evidence. It is averred, in the complaint, that the real estate, and part of the personal, included in the will, were purchased by the husband, with his own money, and proof was offered to sustain that allegation, and refused. Was this error? We can not think it was. If it was purchased and given to her by her husband, she could so will it, as no facts are alleged, if any could be in any case, showing that there was any trust. Nor are any facts shown that would prevent such gift. If the property did not belong to the testatrix, she could confer no title by the will. A case might present itself of so gross a character, in this respect, as to evidence unsoundness of mind; but we do not understand the evidence to have been offered to establish such fact in this case.

Per Curiam.—The judgment is reversed. Cause remanded.

Wilson Morrow, Robert M. Goodwin, and John M. Johnston, for the appellants.

George Holland and C. C. Binkley, for the appellees.

The Indiana Central Railway Co. v. Gulick.

GRAVES v. RAYLE and Others.

APPEAL from the *Howard* Common Pleas.

Per Curiam.—Under the peculiar circumstances of this case, we think the Court should have continued the cause.

The judgment is reversed, with costs. Cause remanded, etc.

J. W. Robinson and *Thomas A. Hendricks*, for the appellant.

Samuel C. Willson, for the appellees.

NOTE.—The motion for a continuance was based upon an affidavit of *C. D. Murray*, containing, in substance, this statement: That, at the request of the plaintiff's attorney and *Capt. Harrison*, the late attorney of the defendant (the appellant), he appeared for the defendant in this action, and that he was informed, and believed, that *Graves* knew nothing of *Capt. Harrison*'s absence from home, or that there existed any necessity for the employment, by him, of other counsel, and that *Capt. Harrison* had volunteered two months before, and was then in the army, in *Western Virginia*, and that he, *Murray*, was informed by the agent of *Graves*, that *Graves* was under the impression that this (*Howard* Common Pleas) Court, did not meet in regular session until the Monday then next following, and that he, *Murray*, had had no opportunity of conferring with *Graves*, as to his defense herein. The Court refused, upon this affidavit, to grant the continuance, and rendered judgment.

THE INDIANA CENTRAL RAILWAY Co. v. GULICK.

In an action against a railroad company to recover the value of a lost trunk, the *ex parte* affidavit of the plaintiff is not competent evidence to prove the contents of the trunk, but the plaintiff himself is a competent witness for that purpose.

APPEAL from the *Miami* Circuit Court.

PERKINS, J..—Suit by *Gulick* against the *Indiana Central Railway Company*, to recover the value of a trunk and

Cheny v. Shelbyville.

contents, alleged to have been lost by the company. On the trial, the plaintiff was allowed to give in evidence his *ex parte* affidavit as to the contents of the trunk, etc. The defendant objected and excepted to that item of evidence. The Court erred in admitting the affidavit as evidence. Redfield on Railways, 1st ed., p. 310. The Circuit Court was misled, and somewhat excusably so, by the case of *Doyle v. Kiser*, 6 Ind. 242.

In that case, the affidavit of the plaintiff was admitted in evidence, but the facts, which do not appear in the report, are, that the affidavit was admitted by consent, after the Court had determined that the plaintiff was a competent witness. The point in the case, and the one decided, was, that the plaintiff was a competent witness. This is very manifest, from the cases upon the authority of which the ruling in *Doyle v. Kiser* was made. They were cases where the plaintiff was a witness. See the note to *The Great Northern, etc. v. Shephard*, 9 L. and Eq. Rep. 477, and *The Mad River, etc. v. Fulton*, 20 Ohio, 318.

Per Curiam.—The judgment is reversed, with costs. Cause remanded for a new trial.

Newcombe and Tarkington, for the appellant.

M. Igoe, for the appellee.

CHENY v. SHELBYVILLE.

APPEAL from the *Shelby* Circuit Court.

Per Curiam.—According to the cases of *Bogart v. New Albany*, 1 Ind. 38, and *Webb v. Thorpe*, 12 Id. 451, we have no jurisdiction of this case; but if we have, the case of *The City of Lawrenceburg v. Wuest*, shows that we must affirm the judgment rendered in it below.

Best and Another v. Powers.

A city may impose a liquor license, but it must be reasonable in amount.

The appeal is dismissed, with costs.

Ray and Davis, for the appellant.

Thomas A. Hendricks and P. M. Green, for the appellee.

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Best and Another v. Powers.

Where an action is tried before a Justice of the Peace, and judgment rendered, and appeal taken to the Circuit Court, and in the latter, without leave, the plaintiff inserts a material amendment in his complaint, such amendment can constitute no part of the complaint, and the Court should, on proper application, instruct the jury to allow nothing under it.

APPEAL from the *Howard* Circuit Court.

Per Curiam.—In the Circuit Court, without leave, the plaintiff amended his complaint, by inserting a demand for money paid. The defendants were not aware of the amendment till some progress had been made in the argument of the cause, and did not, therefore, meet it by evidence on the trial. Some of the plaintiff's evidence tended to prove the demand, and it is not clear but that the jury allowed it, or a part of it.

The defendants asked a new trial, supported by affidavits, on the ground of surprise, and that the claim alleged was utterly groundless.

The amendment was no part of the complaint, and the Court should have, upon application, told the jury to allow nothing under it. Such was the course the defendants' counsel should have taken; but, considering the manner (which we will not describe) in which it would seem that

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the amendment must have been made, and the surprise and embarrassment it produced, it is, perhaps, somewhat excusable, if counsel were thrown off their guard as to the course to be pursued, at the moment.

We incline, in this case, to give a new trial.

The judgment is reversed, with costs. Cause remanded for a new trial.

R. Vaile and N. R. Lindsay, for the appellants.

J. W. Robinson, for the appellee.

NOTE.—This action originated before a Justice of the Peace, as indicated in the syllabus.

DUNLAVY and Others v. THE STATE, on the Relation of Sheeks, etc.

APPEAL from the *Lawrence* Common Pleas.

Per Curiam.—Action by the appellee against the appellants, upon an administration bond. Issues were formed, tried, and found for the plaintiff, and judgment rendered, a new trial being refused.

There is no question presented by this record for our decision. There is no exception taken to any ruling of the Court, except in overruling the motion for a new trial, and the evidence is not set out, nor is any question made outside of the evidence.

The judgment below is affirmed, with costs and five per cent. damages.

Carlton and Parks, for the appellants.

Malotte and Cobb, for the appellee.

Estep and Others v. Burke and Another.

ESTEP and Others v. BURKE and Another.

A joint demurrer by three parties to a complaint, which is good as to some of them, is bad as to all, and should be overruled, because a pleading, bad as to a part, is bad as to all the parties to it.

A complaint based upon a contract which is required, by the statute of frauds, to be in writing, should contain the original contract, or a copy of it, or an excuse for not containing either.

Where several notes are made payable at a bank, and are sold and assigned, by the payee, to the bank, and they fall due, and all the parties thereto, except the payee, in consideration of further time, execute and deliver to the bank their bill of exchange for the debt evidenced by the several notes, discharging the payee of the notes from all liability to the bank, the parties to such bill, in an action upon it, can not be allowed to inquire into the consideration of the notes.

APPEAL from the Wayne Circuit Court.

PERKINS, J.—Burke and Kramer sued *James Estep, Isaac Estep, and Nathan Druly*, upon a bill of exchange.

A joint demurrer was filed to the complaint, alleging that it did not contain a cause of action against a part of the defendants.

A pleading bad as to a part, is bad as to all. Hence, a demurrer by three, good only as to one, if taken separately, is bad as to all, being taken jointly.

A paragraph of the answer set up, in defense, an agreement, which the statute of frauds requires to be in writing, but was not accompanied either by the written agreement, or a copy of it, or an excuse for not furnishing one or the other. The paragraph was, also, utterly bad, on motion for uncertainty. The Court sustained a demurrer to it.

The facts in relation to the bill of exchange, are these: One *Harman Estep* rented of *Nathan Druly* a tract of land,

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and gave his notes for the amount of the rent. *James* and *Isaac Estep* went upon the notes as sureties.

The notes were made payable at bank, and were sold and assigned by *Druly*, the payee, to the bank. When the notes fell due, *James Estep*, one of the sureties, proposed to the bank, that, if time could be given, he would assume the payment of the notes as principal, draw a bill of exchange for the amount of them, upon *Isaac Estep*, who would accept the same, and that it should then be indorsed by *Nathan Druly*, with which bill he would take up the original notes. This arrangement was executed, and *Harman*, the original debtor, ceased to be a debtor to the bank, but became such to *James Estep*, unless he had already advanced to him the amount of the notes. The bank was a *bona fide* purchaser of the original notes.

Under these circumstances, the defendants to the bill could not go into the original consideration of the notes, for the giving up of which the bill was drawn. A continuance was asked, to obtain inadmissible evidence, *viz.*: touching the consideration of the original notes, and was rightly refused.

Per Curiam.—The judgment is affirmed, with five per cent. damages and costs.

W. A. Bickle and *C. H. Burchenal* for the appellants.

John Yaryan, for the appellees.

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Ex PART_E MAXWELL.

A married woman is competent to be appointed guardian, but, before her appointment, it should appear to the Court that her husband consents thereto, and that not only she, but her husband also, is a suitable person to act as guardian.

Ex Parte Maxwell.

APPEAL from the *Wayne* Common Pleas.

PERKINS, J.—*William A. Rambo* died, leaving *Miriam A. Rambo*, his widow, and *Naomi C.* and *Francis H. Rambo*, his infant children and heirs, by said *Miriam A.*, surviving him. Subsequently, *Miriam A. Rambo* married *Hugh W. Maxwell*, and thereby became *Miriam A. Maxwell*.

With the consent of her living husband, who also became her surety in a bond tendered to the Court, she applied to the *Wayne* Common Pleas for the guardianship of the persons and property of her two minor children by *Rambo*; but the Court refused to appoint her.

It was in proof that she was intelligent and worthy, but there was no proof as to the character of her husband.

By the common law, as administered in the Chancery and Ecclesiastical Courts, a married woman is not disabled to be an executrix, administratrix, or guardian; though, as such, she may be required to give bond. 2 Story's Eq., secs. 1337 to 1339. 2 Shars. Black. p. 503, and note 15. Reeve's Dom. Relations, p. 122. New Am. Encyclopedia, art. Guardian. 1 Will. on Ex., p. 360. But her husband must consent to her acting in such capacity. Wentworth on Ex., p. 362, *et seq.* 1 Will. on Ex. 295. Will. on Per. Prop. side, p. 255. See *Kettlebas v. Gardner*, 1 Paige, Ch. R. 488. *Palmer v. Oakley*, 2 Doug. (Mich.) 433. 30 Ala. 613. 29 Miss. (7 Cush.) 195. Our statute touching the capacity of a married woman to act as executrix is simply declaratory of the common law. 2 R. S., p. 484. See p. 486, sec. 10. Touching guardianships, our statute specifies no disabilities. *Id.* 563. Does it not, then, by the ordinary rules of construction, leave the question of competency to the common law? That law requires, in the judgment of the Court, a suitable person. It will occasionally happen, as in this case, that the mother, a married woman, will not only be a suitable, but will, in fact, be peculiarly a proper person to be the guardian of her own children. But she should not be appointed, unless her

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husband is also a suitable person to act as guardian ; because he may be expected to control, in a great measure, the action of his wife. Nor should he be accepted as her sole surety, even where he is a suitable person to act as guardian, unless his pecuniary resources are ample. In the case at bar, as it was not shown that the husband was a suitable person, the judgment below must be affirmed.

Per Curiam.—The judgment is affirmed, with costs.

J. B. and J. F. Julian, for the appellant.

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ADKINS v. WISEMAN.

Where a reply consists of two paragraphs, of which one is the general denial, and a demurrer is filed to the reply generally, it is error to sustain it, because such a demurrer is addressed to the entire reply.

APPEAL from the *Monroe* Circuit Court.

Per Curiam.—*Adkins*, who was the plaintiff, sued *Wiseman*, alleging, in his complaint, “That the defendant is indebted to him one hundred dollars, cash had and received by defendant, to and for the use of the plaintiff,” which the defendant, though requested, etc., refuses to pay.

Defendant’s answer alleges, that he was, on the 1st of December, 1857, the owner of one hundred and five dollars in notes on the *Citizen’s Bank of Gosport*, which were issued without authority of law; that the plaintiff, at the time, was in the business of purchasing notes at discount; and that plaintiff, as well as defendant, at the time, well knew that notes on said bank were not very current, and great doubts were entertained as to whether said bank would ever redeem her notes; that plaintiff, with a full knowledge of all said

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facts, proposed to purchase of defendant the aforesaid notes on the *Citizen's Bank*, and offered him one hundred dollars for the one hundred and five dollars on said bank, and defendant then agreed to said proposal, and received from plaintiff one hundred dollars, and delivered to him one hundred and five dollars in notes on said bank, as aforesaid.

Plaintiff replied: 1. By a general denial. 2. That the *Citizen's Bank of Gosport* was not organized under, or by virtue of, any law of this State, but in direct violation of the constitution and laws of said State, and against public policy; that the notes on said bank are made in the form and similitude of ordinary bank-notes, and were designed and intended to be used and circulated as paper money, and that the same are illegal, unconstitutional, and void, and did not constitute a valid consideration, etc.

Defendant demurred to the reply. The demurrer was sustained, and final judgment given for defendants. The demurrer should have been overruled, because it was addressed to the entire "reply," and there is, evidently, one valid paragraph—the "general denial." 11 Ind. 458. 9 *Id.* 241.

The judgment is reversed, with costs. Cause remanded for further trial.

S. H. Buskirk and Thomas A. Hendricks, for the appellant.

KNIGHT *v.* BAMBERGER.

APPEAL from the *Morgan* Circuit Court.

Per Curiam.—The appellee, who was the plaintiff, sued *Knight*, upon a promissory note, for the payment of six hundred and three dollars thirty cents. Defendant's answer contains two paragraphs: 1. Set-off. 2. That this suit was originally instituted in the *Morgan* Circuit Court, at the

The State on the Relation of *McArthur v. Evans*.

special July term thereof, 1860, and was not a cause pending in said Court at a regular term.

To the first defense the plaintiff replied by a general denial, and to the second he demurred. The demurrer was sustained. The Court tried the issues, and found for the plaintiff. New trial refused, and judgment, etc. The sustaining of the demurrer to the second defense is assigned for error. There is nothing in that assignment. See Acts of 1858, p. 37. A suit may be brought to a special term, and the same tried and determined at such term.

The judgment is affirmed, with costs and five per cent. damages.

R. L. and T. D. Walpole, and Gordon Tanner, for the appellant.

H. Secrest and S. Turman, for the appellee.

THE STATE, on the Relation of *McArthur v. Evans*.

A prosecution for bastardy is a civil proceeding, and the defendant is a competent witness for himself, under the law of 1861, on the subject of witnesses.

APPEAL from the *Davies* Circuit Court.

DAVISON, J.—Prosecution for bastardy against *Evans*. The issues were submitted to a jury, who found for the defendant. Motion for a new trial denied, and judgment on the verdict.

Upon the trial *Evans*, the defendant, offered himself as a witness, and was, over the plaintiff's objection, allowed to testify in the cause. This ruling is assigned for error. The statute says: "Every free white person, of competent age,

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shall be a competent witness in any civil cause or proceeding, and no person shall be disqualified as a witness by reason of interest in the event of that or any other suit, or because such person is a party in said action or proceeding." Acts 1861, p. 52, sec. 2. The decision of the Court is said to be erroneous, on the ground that a suit for bastardy is not a "civil cause or proceeding," within the purview of the statute. We think otherwise. The "Act regulating Prosecutions in cases of Bastardy," provides, sec. 6, that, "The trial of such prosecution, both before the Justice and in the Circuit Court, shall, in all respects not herein otherwise provided for, be governed by the law regulating civil suits." 2 R. S., p. 486. This seems to allow the inference of a legislative intent that a case of this kind should be held a civil proceeding. And, in addition, its commencement, prosecution, and final determination, as prescribed by the statute, sufficiently distinguish it as a civil suit; and being so, the defendant, in this instance, was a competent witness. Another assigned error is, that the verdict is unsustained by the evidence. There is nothing in that assignment. The evidence is upon the record. We have carefully examined it, and are of opinion that its weight accords with the finding of the jury.

Per Curiam.—The judgment is affirmed, with costs.

James S. Pierce and R. A. Clement, for the appellant.

J. W. Burton, for the appellee.

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TETER and Another *v.* HINDERS and Another.

Where several defendants demur jointly to a complaint which states a good cause of action as against some of them, and not as against others, the demurrer should not be sustained.

Teter and Another v. Hinders and Another.

The fraudulent representations of an agent, made in the course of the business of his principal, bind the principal.

Before a party can be entitled to rescind a contract, he must offer to place the other party to it in *statu quo*.

APPEAL from the *Clinton* Circuit Court.

WORDEN, J.—Action by the appellees against the appellants to rescind a contract for the sale of real estate, on the ground of fraud. Trial by the Court; finding and judgment for the plaintiffs. A demurrer to the complaint was overruled, and exception taken. This ruling presents the first question for decision. One *Barnhizer* was made a defendant, who acted as the agent of the defendant, *Teter*, in making the contract; and it is objected that there is no cause of action against *Barnhizer*, and that he should not have been made a defendant. We express no opinion on this point, as *Barnhizer* and *Teter* jointly demurred, and the demurrer, not being well taken as to *Teter*, was correctly overruled as to both.

The consideration for the sale of the real estate was certain promissory notes, and this is sufficiently set forth in the complaint. The alleged fraud consists in false representations in reference to the character of the notes as to the solvency of the makers, etc. It is objected that the complaint is bad, because it does not allege that *Teter* was cognizant of the worthless character of the notes. It is alleged that *Barnhizer*, who was acting as *Teter*'s agent, and who is charged with having made the fraudulent representations, had full knowledge, etc. This was sufficient. The representations of the agent bind the principal. Bateman on Civil law, sec. 575. The objections made to the complaint, we think, are not well taken. But there is a fatal defect in the evidence. In order to justify a rescission, the plaintiff should have tendered back the claims received, so as to have placed the defendant in *statu quo*. *Wiley v. Howard*, 15 Ind.

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169, and authorities there cited. Here a small part of the money had been collected by a justice, and received for by *Hinders*, and this was not tendered back to *Teter*. The claims traded for the land seem to have been evidenced by receipts of parties with whom they had been left for collection. A person acting for the plaintiffs took the papers to one *Wallace*, of Monticello, who picked out about four hundred dollars of the claims, stating that they were his receipts, and that he was entitled to them, and that he had collected the money and paid it over to *Barnhizer*. These receipts were retained by *Wallace*, and were not tendered back to *Teter*. Perhaps, had there been proof, on the trial, that these claims had been collected and paid, as stated by *Wallace*, that would have been a good reason for not tendering them back, but there was no such proof.

Per Curiam.—The judgment is reversed, with costs, and the cause remanded.

J. N. Sims, for the appellants.

ENSLEY and Another *v.* PATTERSON.

Where money, lent to be wagered upon the result of an election, is the consideration of a note given for its repayment, and the maker is sued upon the note, and relies upon the illegality of the transaction to defeat a recovery, he must aver, in his answer, that the money was "lent at the time of such wager."

APPEAL from the *Shelby* Common Pleas.

HANNA, J.—Suit on a note dated November 7, 1856. Answer, admitting the execution of the note, but averring that it was given for an illegal consideration, viz.: "The sum of one hundred dollars, given to these defendants for the purpose of betting and wagering on the result of the

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gubernatorial election in 1856, to be determined at the biennial election in the month of October, 1856, and that the payee of said note, at the time he took said note, and gave defendants said money, directed and authorized them to bet and wager said money on said election, and for the purpose of wagering it, gave it to them, knowing that they would do so; and that, in pursuance of said direction and understanding of said payee, they did wager," etc., and lost and paid, etc.

There was a demurrer sustained to this paragraph of the answer, which ruling presents the only point in the case.

It will be observed that the date of the note, which is made a part of the complaint, is after the decision of the question upon which the wager was made, viz.: the October election. The first question is, then: Whether the answer thus framed is not so contradictory as to render it uncertain whether the money was lent for the purpose named? The form of the pleading appears to admit the execution of the note at its date. It is averred, that at the time the payee "took said note and gave defendants said money, he directed," etc., that it was for the purpose of being wagered on the election for governor, "to be determined at the biennial election in the month of October, 1856." Not to be determined by a canvass of the return of the votes cast at the said October election, before the execution of said note, but the language would imply that it was to be determined by an event which was to transpire in the future—but one which, in point of fact, was already past. The question upon this point is not without difficulty, and as it is not necessary to the determination of the validity of this answer, we will not decide it.

The next question arises upon the construction of our statute, as applied to the facts pleaded, touching "gaming contracts." 1 R. S. 305. The first part of sec. 1 declares, all notes, etc., when the consideration, etc., is for money won, etc., to be void. The second part is framed with

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reference to the first, and likewise declares void all notes, etc., "for repaying any money lent at the time of such wager, for the purpose of being wagered."

Do the facts pleaded bring this transaction within this statute, as to the time the loan was made and the wager entered into?

We might remark, in passing, that the doctrine laid down in *Armstrong v. Toler*, 11 Wheat. 272, that "No action can be maintained on a contract, the consideration of which is either wicked in itself, or prohibited by law," is, no doubt correct; so, in regard to the principle laid down in Parsons on Cont., 253, 2d vol., that "All contracts which provide that any thing shall be done which is distinctly prohibited by law, or morality, or public policy, are void." The trouble is, who are to fix the standard or rule by which we are to determine whether any given state of facts falls within these prohibitions?

We suppose the legislative power, acting within the sphere of its authority, can point out the acts which shall fix upon a transaction the stain of illegality, and the degree of evidence that shall be necessary to establish such acts. For instance, in this case, a note for the loan of money to be wagered, that is, "for the purpose of being wagered," is a void contract; but, as much controversy might arise in reference to the question, whether that was the purpose for which the loan was made, they have said that the money must be "lent at the time of such wager." Is that fact sufficiently averred in the answer? We do not think it is; whatever might have been the ruling, without this statute, it seems that the legislature, having legislated upon this subject, and prescribed a rule, however limited it may be considered, yet it should be our guide.

Per Curiam.—Judgment is affirmed, with costs and five per cent. damages.

T. A. McFarland and J. L. Montgomery, for the appellants.
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Shucraft and Another v. Davidson.

CONNER v. THE STATE.

A record in a criminal case, based upon an indictment, which fails to show the impanneling of a grand jury, and the return by them of the indictment into Court, indorsed *a true bill*, and signed by their foreman, can not sustain a conviction on such indictment.

APPEAL from the Grant Circuit Court.

Indictment for retailing. Trial, conviction, and judgment, motions to quash and in arrest being overruled. The record, in this case, does not show the impanneling of any grand jury, nor the return by such body of the indictment into Court, nor is it indorsed *a true bill*, and signed by any one purporting to be acting as foreman of the grand jury.

The judgment is reversed, and the cause remanded, etc.

N. W. Gordon and H. D. Thompson, for the appellant.

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SHUCRAFT and Another v. DAVIDSON.

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In an action to vest and quiet title to real estate in the plaintiff, if judgment goes against him below, he is entitled, on payment of the costs, to a new trial, as a matter of right, under the statute.

APPEAL from the Wayne Circuit Court.

Per Curiam.—This was a suit by the sole heir of *John Evans* and her husband, to establish the title of said heir to a certain piece of land, by descent, from her father. The land was in possession of *Davidson*, under claim of title, by deed, from the ancestor of the heir in question. The heir sets up, that *Davidson* obtained the deed for the land from the ancestor, without any consideration, when he was not *compos mentis*, and hence, was incapable of making a

The State *v.* Thomasson.

deed; and the complaint prays, that the title to said land may be adjudged to be in the heir by descent, and possession given.

Trial of the issue upon the complaint, judgment for the defendant.

The Court below refused to give the plaintiffs a new trial, as matter of right, upon payment of costs.

* This was not a suit for specific performance of a contract. *Allen v. Davison*, 16 Ind. 416. Such a suit is not based on disputed title.

It was not a suit by creditors to set aside a fraudulent conveyance, in order to show title in their debtor, subject to execution.

It was a suit in which the party complainant, by virtue of the judgment in the suit, sought to vest or quiet title to real estate in herself. It seems to be exactly the case of *Sherman v. Gaines*, 15 Ind. 93. The question of fraudulent deed could be tried in ejectment, under the old practice. Ind. Dig., p. 62.

Reversed, costs, remanded, etc., with instructions to give a new trial on payment of costs.

THE STATE *v.* THOMASSON.

The temperance law of 1859 prescribes no penalty against the sale of intoxicating liquor, in quantities of one quart or more, on Sunday. An indictment for unlawfully selling liquor without license, should charge that the liquor sold was intoxicating.

APPEAL from the Warren Circuit Court.

HANNA, J.—Indictment for retailing quashed. *The State* appeals. The question is upon the sufficiency of the indict-

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ment. It is charged that the defendant, on, etc., at, etc., "did then and there unlawfully sell intoxicating liquors to one, etc, to-wit: one quart of whisky, for the sum of fifteen cents, the said 11th day of, etc., being Sunday, commonly called the Sabbath day."

The eighth section of the Act of 1859, is, that "A license, granted under the provisions of this act, shall not authorize the person so licensed to sell or barter any intoxicating liquors on Sunday, nor to a minor, nor to a person intoxicated." As to the two last-named classes, there is afterward an express penalty fixed for offending; as to the former, there is not; but it has been decided, that the general penalty for selling less than a quart, without a license, (sec. 10,) attaches to such sales on Sunday. *Thomasson v. The State*, 15 Ind. 455. The prohibition, in the first section, is against selling less than a quart, without a license; in the eighth section, it is provided, that the license to retail shall not authorize the selling any quantity on Sunday, although licensed; but, as before stated, there is annexed no special penalty to that section. This prosecution is for selling a quart of whisky. This indictment would be bad, if the selling had been charged to have been on Saturday; is it good, charging it to have been done on Sunday? We are of opinion that it is not. As before said, there is no penalty for a violation of that special part of the statute providing that the license shall not confer authority to sell *any* liquor on Sunday. The license only gives the privilege of selling less than a quart, on any day, and not that, on Sunday. Other statutes regulate the proceedings for violations of that day.

Per Curiam.—The judgment is affirmed.

R. W. Harrison, Prosecuting Attorney, and *T. J. Cason*, for the State.

H. M. Nourse, J. H. Brown, and James Park, for the appellee.

Wilson's Executor v. Rudd and Another.

WILSON's Executor v. RUDD and Another.

In 1858 A died, leaving a widow, five children, and seven grandchildren. His will contained these provisions: "2. I give and bequeath to my wife two beds and bedding, to be selected by her, twenty-five dollars a year, as long as she lives, and a good, comfortable support during her life; also, the use, during life, of the house we now occupy, together with the furniture and other articles necessary to keep house. 3. I give and bequeath to my grandchildren [naming them] one hundred dollars each. 4. After the payment of all legacies, I give and bequeath to my children, [naming them, *John Wilson, Jr.*, being one] and my grandchildren, [naming them] and their survivors, all my estate, both real and personal, to be divided among them, said grandchildren to take jointly one-sixth thereof. 5. If my wife dies before me, or, surviving me, does not accept the provisions of this will, then I direct that all my real estate be sold by my executor, at public or private sale, as he may think best; if at public sale, for not less than two-thirds of the appraised value thereof; if at private sale, at the full appraised value, etc. 6. If my wife survives me, and accepts the provisions of this will, then I direct that none of the legacies, except the provisions for her, be paid until her death. Immediately after her death, I direct that my real estate be sold as provided for in item 5 of this will; the special legacies to be paid first out of the proceeds of such sale, and after the payment thereof, the balance of such proceeds, and all my personal estate, be distributed among my children and grandchildren, as directed in item 4 of this will." Said will was admitted to probate, and the widow accepted its provisions and entered into the possession and enjoyment of the real estate thereby devised. In 1859, B recovered a judgment against said *John Wilson, Jr.*, in the *Morgan* Circuit Court, upon which execution was issued, and levy thereof made on his interest in said real estate.

Held, that *John Wilson, Jr.*, under the provisions of said will, had a vested interest in said real estate, which, under the law of this State, is subject to levy and sale on execution.

Wilson's Executor v. Rudd and Another.

APPEAL from the *Johnson* Circuit Court.

DAVISON, J.—This was an action by *Jacob Giles*, executor, etc., against *James Rudd* and *Eli Butler*, to enjoin the sale, on execution, of real estate. Defendants demurred to the complaint; but the demurrer was overruled, and they excepted. Final judgment was given against them.

The facts alleged are as follow: In February, 1858, *John Wilson, Sr.*, died, leaving a widow, five children, and seven grandchildren. At his death he left a will, which contained these provisions: 2. I give and bequeath to my wife, *Jane Wilson*, two beds and bedding, to be selected by her, twenty-five dollars a year as long as she lives, and a good, comfortable support during her life; also, the use, during life, of the house we now occupy, together with the furniture and other articles necessary to keep house. 3. I give and bequeath to my grandchildren, *Desdemona Furguson*, *Nancy Cassel*, *Betsey Clark*, *John Clark*, and *Catherine Clark*, one hundred dollars each. 4. After the payment of all legacies, etc., I give and bequeath to my children, *James Wilson*, *Serah Terhune*, *John Wilson, Jr.*, *William Wilson*, and *Richard Wilson*, and my grandchildren, *Jorden Hunt* and *James Hunt*, and their survivors, all my estate, both real and personal, to be divided among them, said grandchildren to take jointly one-sixth thereof. 5. If my wife dies before me, or, surviving me, does not accept the provisions of this will, then I direct that all my real estate be sold, by my executor, at public or private sale, as he may think best: if at public sale, for not less than two-thirds of the appraised value thereof; if at private sale, at the full appraised value, etc. 6. If my wife survives me, and accepts of the provisions of this will, then I direct that none of the legacies, except the provisions for her, be paid until her death. Immediately after her death, I direct that my real estate be sold as provided for in item 5 of this will; the special legacies to be first paid out of the proceeds of such sale, and, after the payment thereof, the

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balance of such proceeds, and all my personal estate, to be distributed among my children and grandchildren, as directed in item 4 of this will.

It is averred, that said will was duly admitted to probate, that the widow accepted its provisions, and is in the possession and enjoyment of the real estate thereby devised. And further, it is averred, that, on the 17th of May, 1859, the defendant, *James Rudd*, recovered a judgment, in the *Morgan* Circuit Court, against *John Wilson, Jr.*, one of the children and devisees named in the will, for eleven hundred and sixty-one dollars, upon which judgment an execution has been issued, and placed in the hands of *Eli Butler*, the proper sheriff, who has levied it upon all the interest of said *John Wilson, Jr.* in and to the real estate so devised, etc. The relief sought is, that the defendants be enjoined from selling the estate levied on, etc.

The only question to settle is, Had *John Wilson, Jr.*, in virtue of the testator's will, a leviable interest in the property?

We have a statute which says: "The following real estate shall be liable to all judgments and attachments, and to be sold on execution against the debtor owning the same, or for whose use the same is holden, viz.: 1. All lands of the judgment debtor, whether in possession, reversion, or remainder. 2. Lands fraudulently conveyed, with intent to delay or defraud creditors. 3. All rights of redeeming mortgaged lands: also, all lands held by virtue of any land-office certificate. 4. Lands, or any estate or interest therein, holden by any one in trust for, or to the use of another. 5. All chattels real of the judgment debtor." 2 R. S., pp. 153, 154.

These provisions, it seems to us, make every interest which a judgment debtor has in real estate, liable to execution. It is, however, insisted that, under the will, *John Wilson, Jr.* has really no interest in the land levied on; but a mere expectancy to share its proceeds when sold by the

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executor. We are not inclined to adopt that conclusion. By the fourth and sixth clauses in the will, the legal title to the lands vested, directly, in the testator's children and grandchildren. Nor does the provision in the will which directs the sale of the lands, after the death of the widow, and the distribution of the proceeds, at all conflict with the position that the devisees hold a vested interest. *Rumsey v. Durham*, 5 Ind. 71, is precisely in point. In that case, "A testator, by his will, gave to his wife, as long as she should remain his widow, the use, etc., of all his real and personal property, for the support of herself and family." The will then proceeded as follows: "After the death or marriage of my wife, my will is, that all my property, real as well as personal, shall be sold, and be equally divided among my children." "Held, that the property vested in the children at the decease of the testator." This decision, when applied to the case at bar, at once shows that, in the real estate devised by the will, *John Wilson, Jr.* had a vested interest, and, consequently, a leviable interest, which may be sold on execution. The purchaser at sheriff's sale may not, it is true, have the right to enter upon and possess the property sold, under the sheriff's deed, but the sale and deed will invest him with all the interest which the execution-defendant has in the property, or may have in its proceeds, when sold by the executor, in virtue of the power to sell conferred by the will. The demurrer was, in our opinion, well taken, and should have been sustained.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, etc.

W. R. Harrison and S. P. Oyler, for the appellants.

G. M. Overstreet and A. B. Hunter, for the appellees.

Atherton v. Williams.

ATHERTON v. WILLIAMS.

The statute of limitations applicable to suits upon contracts in writing, does not operate until the party has a right to apply to the proper tribunals for relief in the particular case.

Where one person executes a mortgage upon his own land, for the accommodation, and to secure the debt, of another person, and takes from the latter a bond conditioned that he "would pay and satisfy the mortgage, together with all interest and costs thereon, accrued, accruing, and to accrue, and, in every respect, save the mortgagor harmless, and without loss in the premises," and the latter fails to pay the mortgage debt, and suffers the mortgaged property to be sold to pay the same, and thereby lost to the mortgagor, the proper measure of damages to which the mortgagor is entitled is the value of the mortgaged property at the time it was sold.

APPEAL from the *Madison* Circuit Court.

DAVISON, J.—*Robert N. Williams*, who was the plaintiff, sued *Willis G. Atherton*, who was the defendant, upon a bond executed by said defendant, and one *Joel Blackledge*, to the plaintiff. The bond bears date June 1st, 1838, is in the penalty of two thousand dollars, and is conditioned thus:

"Whereas *Robert N. Williams* did, on the 24th of May, 1838, make and execute his certain mortgage, on the west half and the north-east quarter of the north-east quarter of section 33, town 20, north of range 7 east, and the south half of the north-east quarter of section 3, town 19, north of range 7 east, containing two hundred acres of land, to the State of *Indiana*, for the sum of five hundred dollars, payable five years after the date thereof, with eight per cent. per annum interest thereon, payable in advance, annually, at the Branch, at *Indianapolis*, of the State Bank of *Indiana*, which said mortgage was made and executed for the special benefit and use of the said *Willis G. Atherton* and *Joel Blackledge*, who drew and applied the avails thereof to their own use and purposes. Now, therefore, should they—the said

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Willis G. Atherton and Joel Blackledge—pay and satisfy the above described mortgage, together with all interest and cost thereon, accrued, accruing, and to accrue, and in every respect save harmless, and without loss, the said *Williams*, in the premises, then the above obligation to be void; otherwise to be and remain in full force,” etc.

The complaint shows that *Blackledge*, after the execution of the bond, and before commencement of this suit, departed this life. And, for breach of said condition, it is alleged that the defendant did not, nor did the said *Blackledge*, in his life-time, pay or satisfy any part of the mortgage, nor did they pay or satisfy any interest and costs that had accrued thereon. But, in consequence of their failure so to do, the real estate, so mortgaged by the plaintiff, was forfeited to the State, and afterward, on the 14th of November, 1845, was sold by the State for six hundred dollars, to one *Townsend Ryan*, to pay and satisfy the principal, interest, and costs that had accrued thereon. And further, it is averred, that said real estate was, at the time of the forfeiture and sale aforesaid, of the value of two thousand dollars. Damages are laid at three thousand dollars.

The issues were submitted to the Court, who found, for the plaintiff, one thousand four hundred and forty-nine dollars, and, over a motion for a new trial, rendered judgment, etc. The record contains the following agreement of facts: “The mortgage referred to in the complaint was executed on the 22d of May, 1838, was for the sum of five hundred dollars, and was upon the land described in the bond in suit. Said land was sold for the non-payment of interest due on the mortgage, for the years 1843, 1844, and 1845, and was bid in by the State, on the 14th of November, 1845, at a public sale of the same and other lands mortgaged to the sinking fund. After this, on the 1st of September, 1846, the sinking fund, by her commissioners, sold and conveyed all the land described in the mortgage to *Townsend Ryan*, for six hundred

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and four dollars, and that the same was subsequently transferred to *John F. Brickley*, to whom a deed was executed." *Nineveh Berry*, a witness, testified that "the real estate described," etc., "was, at the time of the sale by the sinking fund officers, worth two thousand dollars." The following receipt was read in evidence on the trial:

"ANDERSTOWN, March 22, 1843.

"Received of *Joel Blackledge*, one note on *Thomas Bell*, dated August 9, 1842, due two months after date, for one dollar and thirty cents. Also an order on *Madison Webb* for money collected by him from *Hiram Newkirk*—supposed to amount to seventy-five dollars, with interest. Also an agreement of *R. N. Williams* to pay *Blackledge* sixty-five dollars, in cash notes on good solvent men of *Madison* county, on or before the 1st of March, 1842, amounting now, with interest, to sixty-nine dollars and sixty-two cents, which sums, when collected, I am to apply on the payment of a mortgage, by me executed to the sinking fund, for five hundred dollars, which was executed for the benefit of said *Blackledge* and *Atherton*. And also a balance on settlement of nine dollars and forty cents due from me to said *Blackledge*.

"R. N. WILLIAMS."

It was proved that the money on the *Bell* note, and the order on *Webb*, described in the receipt, were collected by said *Williams*, but not until after the sale of the land by the sinking fund officers. And further, it was proved that the complaint in this suit was filed February the 16th, 1859. This, with the bond sued on, was all the evidence, etc.

The causes for a new trial are thus assigned: 1. The evidence shows that the action is barred by the statute of limitations. 2. The finding is unsustained by the evidence. 3. The Court erred in fixing the measure of damages at the value of the land; it should have been the amount of money loaned, with interest. 4. Under the evidence, the plaintiff was only entitled to nominal damages.

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There is nothing in the first assignment. The bond, it is true, was executed May the 24th, 1838, and the present suit was instituted February the 16th, 1859. Between these dates, more than twenty years, (the period of limitation, applicable to suits "upon contracts in writing,") had elapsed. 2 R. S., p. 76, sec. 211. But the rule is, that the statute of limitations does not operate until the party has a right to apply to the proper tribunals for relief. Angel on Lim., sec. 42. And here the proof is, that the cause of action relied on by the plaintiff did not accrue until the 1st of November, 1845, less than fourteen years prior to the commencement of the action.

Under the second assigned cause for a new trial, it is insisted, that the plaintiff himself was in default; that, by his receipt to *Blackledge*, he was to pay, on the loan, sixty-nine dollars and sixty cents; also, nine dollars and forty cents, making, in the aggregate, seventy-nine dollars, which was more than the interest for which the land was sold, and that the same was sold in consequence of his failure to pay. We do not so understand the evidence. The interest was payable annually, in advance, and the land was sold for a default in the payment of three years' interest, which, at eight per cent. per annum, on five hundred dollars, the sum stated in the mortgage, amounted to one hundred and twenty dollars; hence, a payment of the seventy-nine dollars would not have avoided the forfeiture. But the plaintiff, by the receipt, agreed to pay the sums therein stated, when collected, on the mortgage, not on the interest; and, in sequence, the defendant, notwithstanding the plaintiff's engagement, was bound, in order to avoid the forfeiture, to pay the interest annually, in advance. And it is even doubtful whether the stipulation in the receipt, to pay "when collected," does not relate alone to "the *Bell* note and the order on *Webb*," because the sixty-nine dollars and sixty cents was a sum the plaintiff had agreed to pay

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Blackledge, in cash notes, and the nine dollars and forty cents was an amount due him, by the plaintiff, on settlement, and both of these amounts having been surrendered up to the plaintiff, at the date of the receipt, were, of course, not collectable, according to its terms. It seems to follow, that he was not, on account of these sums, liable to pay any amount on the mortgage.

The note and order, however, were collectable, and "when collected," the moneys arising therefrom were to be so paid; and the evidence shows that they were collected, but not until after the sale of the mortgaged premises by the sinking fund officers.

The next inquiry relates to the damages. The defendant's engagement was, that he "would pay and satisfy the mortgage, together with all interest and cost thereon, accrued, accruing, and to accrue, and, *in every respect*, save the plaintiff harmless, and without loss in the premises." And the facts are, that the defendant failed to pay the mortgage when it matured, or the interest thereon, as stipulated in the contract. The result was, the land was sold, and thereby became lost to the plaintiff. And it seems to us that that result was "the natural and proximate consequence" of the defendant's failure. It follows, the value of the land, at the time it was sold and became so lost to the plaintiff, is the correct measure of damages. Indeed, it may be reasonably supposed, that a failure to perform, resulting in the sale of the mortgaged property, was in contemplation of the parties at the time of the contract; and that, consequently, the intent of that contract has, in this instance, been fairly carried out by the ruling of the Circuit Court. Sedgwick on Damages, pp. 64, 65, 77.

Per Curiam.—The judgment is affirmed, with 3 per cent. damages and costs.

Davis and March, for the appellant.

Gordon and Others v. Montgomery.

GORDON and Others v. MONTGOMERY.

Wherever it is necessary that any person should consent to the interposition of the defense of usury in any case, such consent can be given, and made effective, without such person being a party to the suit.

When a note, payable at a bank, contains in its body the words "protest, and notice of protest waived," such words include a waiver of demand also, and are operative against indorsers.

APPEAL from the *Floyd* Circuit Court.

PERKINS, J.—This was an action by *James Montgomery*, indorsee, against *John Gordon* and two others, indorsers of a promissory note of the following tenor :

"\$102.68.

NEW ALBANY, Feb. 15, 1861.

"One day after date, I promise to pay to the order of *Gordon, Castlen & Gordon*, protest, and notice of protest waived, one hundred and two dollars and sixty-eight cents, for value received, without any relief whatever from valuation, appraisement, or stay laws of *Indiana*, negotiable and payable at the office of the Ohio Insurance Company.

"U. G. DAMRON."

Indorsed, "*Gordon, Castlen & Gordon*."

This note was payable at a bank. Of this fact the Court takes judicial notice, because the Ohio Insurance Company is made a bank of discount and deposit, by a public law. Local Laws, 1849, p. 439. See *Davis v. McAlpine*, 10 Ind. 137.

The defendants answered in two paragraphs. 1. The general denial, without verification. 2. A special paragraph, going to the consideration. A demurrer was sustained to this paragraph, and no exception taken. The case stood, therefore, upon the general denial of the complaint upon the note. On the trial, the only evidence given consisted of the note and the indorsements upon it.

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The Court rendered judgment for the plaintiff.

The defendants asked, that the plaintiff be compelled to join the maker of the note as a party defendant, in order that he might consent to their setting up the defense of usury, but the Court refused the request. Even if this had been a case in which usury could have been pleaded, with the maker's consent, we do not think it was necessary, in order to his giving that consent, that he should be a party to the suit. His consent could have been placed of record without his being made a defendant. No evidence, it may be observed, was sought to be given of usury.

The only remaining question is: Whether the evidence made out the case? It certainly did, if the waiver of protest and notice, expressed in the note, included waiver of demand, and was operative against indorsers. We think such was its effect. It was inserted in the note for some purpose. The only purpose could be to waive protest and notice as to indorsers, for they were the only parties as to whom these acts were required, but for the waiver, to be performed. And, we think, the waiver of protest included the waiver of a demand. Such, we think, must have been the intention of the parties. There is high authority to this effect. *Coddington v. Davis*, 1 Com. (N. Y.) Rep. 186. *Wall v. Bry*, 1 Louis. Rep. 312. *Scott v. Green*, 10 Barr. 108. See Biles on Bills, Sharswood's ed., top p. 350, note.

Per Curiam.—The judgment is affirmed, with five per cent. damages and costs.

Thomas L. Smith and *M. C. Kerr*, for the appellants.

John S. Davis, for the appellee.

Shannon v. Wilson.

SHANNON v. WILSON.

It is not necessary that matter of set-off shall be due at the commencement of the action in which it is pleaded, but it will be available, if it is due, when it is offered in evidence on the trial.

APPEAL from the *Jefferson* Circuit Court.

PERKINS, J.—*Wilson* sued *Shannon*, before a Justice of the Peace, upon an account. *Shannon* answered, setting up an account as a set-off. The cause went, by appeal, to the Circuit Court. In that Court the jury were instructed, upon the trial of the cause, that, in arriving at the balance of account between the parties, they would not allow any item of set-off that had not become due at the time of the commencement of the suit before the Justice of the Peace. The only question, in this Court, arises upon this instruction.

Our statute of set-off is as follows: “The set-off shall be allowed only in actions for money demands upon contract, and must consist of matter arising out of a debt, duty, or contract, liquidated or not, held by the defendant at the time the suit was commenced, and matured at or before the time it is offered as a set-off.” 2 G. and H., p. 88, sec. 57.

Literally, this provision requires: 1. That the defendant shall hold, or be possessed of, the matter of set-off, at the time the suit is commenced against him. 2. That it shall be due; that is, matured for an action upon it, at the time it is offered as a set-off.

The statute evidently has reference to two points of time, viz.: the commencement of the suit, and the time the matter is offered in the suit, by the defendant, as a set-off. It contemplates that these two acts will naturally be performed at different times. The point of time at which the set-off is offered, is certainly a later one than the commencement of the suit; for, at that time, the defendant offers no matter as a set-off. When, in the progress of the cause, is this

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second point of time? This is the question to be determined. Is it when the set-off is pleaded, or when it is offered in evidence on the trial? We think when it is offered in evidence, and for these reasons:

1. If a time is taken later than the commencement of the suit, no reason can be assigned why it should be any other than the time of the trial.

2. We think that the more equitable point of time. If a defendant, at the commencement of a suit, has a set-off against the plaintiff, which will mature before the time of trial, the plaintiff ought to liquidate the amount of that set-off upon his claim before he sues. The policy of the law should be to avoid multiplicity of suits. But there is great justice in limiting this right of set-off to claims held by the defendant at the commencement of the suit, because it would work a hardship upon the plaintiff to be compelled, on the trial, to allow a set-off procured afterward, of which he must, necessarily, have been ignorant, and in no wrong for not crediting upon his account before suit, and which might defeat a suit justly commenced, whereby he would be mulcted in costs.

Per Curiam.—The judgment below is reversed, with costs. Cause remanded for another trial, etc.

H. W. Harrington, for the appellant.

James C. Thom, for the appellee.

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REYNOLDS and Another *v.* HICKS.

After the formation of a partnership between two persons, a third person agreed, verbally, with one of the partners, to pay him one-half of the amount paid in by him, and one-half of one-third of the loss that might occur, and to receive from him one-half of one-

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third of the profits of said partnership, which verbal agreement was long afterward reduced to writing:

Held, that said agreement did not constitute such third person a member of said firm, or render him liable for the debts of the firm, it not appearing that he was held out as a partner.

APPEAL from the Tippecanoe Circuit Court.

HANNA, J.—*Hicks* sued *Reynolds, Hanna, Gibson, and Stockwell*, on a note, averring that they executed the same by the firm name of *Gibson, Stockwell & Co.*

Reynolds answered, under oath, in substance, that he did not execute the said note, because he was not a member of said firm, and had no interest therein, except that, soon after the formation of said partnership between his co-defendants, which was by written articles, set forth, he agreed, verbally, with said *Hanna*, to pay him one-half the amount paid in by him, to-wit: seven thousand five hundred dollars, and one-half of one-third of the loss that might occur; and was to receive from said *Hanna* one-half of one-third of the profits of said concern, and the sum so paid, to-wit: seven thousand five hundred dollars; which agreement was, long afterward, reduced to writing, by said *Hanna* and *Reynolds*; that is, as between the two, he bought one-half of *Hanna*'s interest. It does not appear whether the other members of the firm had any knowledge of this subsequent agreement or not, or whether *Reynolds* was ever held out as a partner.

A demurrer to the answer was sustained. This is assigned as error.

It is conceded, that as among themselves, these defendants, perhaps, were not partners; but it is insisted, that as to strangers, they were. That is, that the original partners might not have any right of action against *Reynolds* for contribution to losses; nor could he assume any control in the affairs, or compel an accounting as to the business of the firm: and yet, as to the debts of such firm he would, as the other partners, be liable to the creditors thereof. On the

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other hand, it is contended that the agreement between *Hanna* and *Reynolds* was a private contract between themselves, with which the firm, and those dealing with them, had nothing to do.

A partnership is a voluntary contract between the persons associating together. Story on Part., secs. 2 and 3. Therefore, one partner can not introduce an additional member into the firm, without the concurrence of his copartners. *Id.* 5.

Although in Story on Part., secs. 86 to 50, it is urged that the reasonable rule would seem to be, that "No partnership should be deemed to exist at all, even as to third persons, unless such were the intention of the parties, or unless they had so held themselves out to the public," yet it is by the author conceded, that "the common law has settled it otherwise" as to principal traders. *Waugh v. Carver*, 1 Smith's S. Ca. 491, and note.

It was held in *Grace v. Smith*, 2 H. Blkst. 998, and followed in *Waugh v. Carver*, 2 *Id.* 235, that "He who takes a part of the profits, indefinitely, shall, by operation of law, be made liable to losses, if losses arise; upon the principle that, by taking part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts." These decisions have been the foundation for many others of like character. *Cheap v. Cranmond*, 4 B. and Ad. 663. *Hoore v. Downs*, Dougl. 371. *Wightman v. Townroe*, 1 M. and S. 412. *Rex v. Dodd*, 9 East, 527.

But it has been held, that contributing money, labor, or capital stock, even with a right to a return from the proceeds, does not, necessarily, make the person a partner; (*Rice v. Austin*, 17 Mass. 197. *Gallop v. Newman*, 7 Pick. 282. *Lark v. Howland*, 5 Denio, 69. *Smith v. Wright*, 5 Sandf. 113,) although such will be the result, if the right to a part of the proceeds of the venture be likewise an interest in the

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proceeds themselves, or in the property out of which they issue. *Noyes v. Cushman*, 25 Ver. 390. *Griffith v. Buffum*, 22 *Id.* 181. *Emanuel v. Drouher*, 14 Ala. 303. *Heimstreet v. Howland*, 5 Denio, 68.

The reason for this latter rule of decision appears to be, that a partner, for advances, is entitled to a preference over creditors of the individual members of the firm, out of the assets thereof; that is, it is something in the nature of a lien thereon. *Pierce v. Jackson*, 6 Mass. 242. *Christian v. Ellis*, 1 Grattan, 396. *Gibson v. Stevens*, 7 N. H. 352. *Denny v. Cabot*, 6 Metcalf, 92. *Turner v. Bissell*, 14 Pick. 192. *Loomis v. Marshall*, 12 Conn. 69.

Because of this preference, if the law confers it on a given state of facts, it also couples it with the burden of being personally liable for debts contracted in such business.

Could *Reynolds* have had such preference? The memorandum of the agreement is as follows: "Soon after the firm of *Gibson, Stockwell & Co.* was created, consisting of *Edmund T. H. Gibson, Nathan H. Stockwell, and Joseph S. Hanna*, it was verbally agreed between said *Hanna* and *William F. Reynolds*, that *Hanna* should account for and pay to said *Reynolds* one-half of the third of the profits of said firm, and one-half of the sum paid into said firm, by *Hanna*, as his part of the capital of said firm, and *Reynolds* agreed to pay *Hanna* one-half of the fifteen thousand dollars advanced as his part of the capital of said firm, and also agreed to pay said *Hanna* one-half of one-third of all the losses of said firm."

It appears to us that the credit for money advanced by *Reynolds* was given to *Hanna* alone, and not to the firm; that he alone was responsible to said *Reynolds* for the return thereof, and for the payment of such parts of the profits as said *Reynolds* might be entitled to; consequently, *Reynolds* had no lien upon, nor interest in, the assets of the firm, nor the profits arising out of the same.

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In fact, it seems that he advanced money to *Hanna* to place in the capital stock of said firm, and not only looked to him for the return thereof, but also for such part of the profits as they agreed upon for the use of said money. *Reynolds*, therefore, having no rights of a partner, such as the right to an account, a lien, a preference for advances, etc., and it not appearing that he was held out as such, should not be, individually, held responsible for the debts of the firm, contracted in the prosecution of said business, according to the class of authorities last above cited.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, etc.

Godlove S. Orth, John A. Stein, Samuel A. Huff, and Robert Jones, for the appellant.

MAJOR *v.* SYMMES.

The contracts of a married woman, in the employment by her of counsel to protect her rights and interests in connection with her property, are valid, and binding upon her, and the claims against her, arising out of such contracts, may be made a charge upon her property, and payment thereof enforced.

The clause of the statute forbidding a married woman to incumber or convey her real estate, except by deed, in which her husband shall join, relates to such direct acts of conveyance, or incumbrance, as previously required the consent of the husband to perfect. *Sembler*, that a married woman may, on general principles, bind her separate estate to pay debts contracted for the benefit thereof.

APPEAL from the *Ohio* Circuit Court.

HANNA, J.—*Symmes*, a married woman, was entitled to an interest in the real estate of a deceased relative. To secure and defend that interest, in litigation which arose among

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the heirs, she employed counsel. After her interest had been set apart, this suit was instituted by counsel, to recover for services, and, she being a non-resident, a lien prayed upon said lands. Her husband was made a party defendant.

Demurrer sustained to the complaint.

It is insisted, by the appellee, that she, being a married woman, could not contract, and, therefore, could not become liable expressly, nor by implication, for the said fees.

Without pausing to discuss the question, whether or not lands, the separate property of the wife, could formerly, in equity, be charged with necessary expenditures in reference thereto, we will proceed to examine our statutes under which married women held property.

"No lands of any married woman shall be liable for the debts of her husband, but such lands, and the profits therefrom, shall be her separate property, as fully as if she was unmarried: *Provided*, that such wife shall have no power to incumber or convey such lands, except by deed, in which her husband shall join." 1 R. S., p. 321.

"All suits relative to such lands, shall be prosecuted by or against the husband and wife jointly, or, if they be separated, in the name of the wife alone; and in case of such separate suit, the husband shall not be liable for costs." *Id.*

"When a married woman is a party, her husband must be joined with her, except: *first*, when the action concerns her separate property she may sue alone; *second*, when the action is between herself and her husband, she may sue or be sued alone; but, in no case, shall she be required to sue or defend by guardian, or next friend, except she be under the age of twenty-one years.

"If a husband and wife are sued together, and the action relates to her separate property, the wife may defend in her own right; and, if her husband neglect to defend, she may defend in his right, also." 2 R. S., pp. 28 and 29.

As, under the statute, these lands were the separate

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property of the wife, as well as the profits arising therefrom, as fully as if she was unmarried; and, also, as, under certain clauses of the statutes, she could sue or defend alone in actions concerning said property, it would appear to follow that, as an incident to such rights, she could employ counsel when necessary to defend her interests or protect those rights.

If there is any substantial conflict between the statutes in the first and second volumes of the Revision, in relation to her right to sue or defend alone in actions concerning such property, then that contained in the second must prevail, being of a later date.

We can very well conceive many cases that might arise, in which it might be to the interest of the husband to refuse his consent to any effort on the wife's part to protect or defend her separate property. It would seem, if, in such cases, she could make contracts, that, under the clauses quoted, she could in any instance affecting such property. If she can not make such contracts in any case, for the protection of the rights attempted to be secured by such legislation, the whole purpose of the statutes may be defeated. But, it is urged, that if she is permitted to make contracts, it will empower her to incumber her property without her husband's consent, which would be in direct contravention of the statute quoted. It is manifest that the purpose of these acts of the legislature was, in certain instances, to vest in a married woman more complete control of her separate property, and its proceeds, than she possessed without such enactments. We do not think it was the intention to abrogate or control any right or power that she possessed at the time of the passage of said statutes, in reference to the management of such property. If not, then, formerly such property could be, in equity, charged with necessary expenses incurred in regard to the same. This might be an incumbrance. We suppose the clause of the

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statute forbidding incumbrances, etc., has relation to such direct acts of conveyance or incumbrance as previously required the consent of the husband to perfect. It is, in that respect, a mere continuance of his supervisory control, or oversight, of her interests. As to the management of such property, short of such conveyance or incumbrance, she can, if she desires so to do, assume sole control. It is in accordance with every day's business experience, that, in the management of as large a property as is here shown to belong to the female defendant, conflicts, in regard to legal rights, will arise, in renting and leasing, and receiving profits, in keeping up repairs, and warding off trespassers. The law must become the arbiter in those conflicts. Was it expected by our law-makers that these new-born rights could be fully enjoyed or protected without the assistance of persons other than the class of females mentioned? If farms need tilling, must she go forth to the fields alone, and without the power to employ assistance? If litigation arises, is her property to be wrested from her, or frittered away, for the want of power to engage assistance of those who might secure to her the very right about which so much interest is thus manifested by legislation?

Without going beyond the case presented, we may safely say that a contract, in the employment of counsel to protect the rights of the defendant in the property thus acquired by descent, should be considered binding. Whether a personal judgment could be made upon the same, under the statutes, we need not inquire, as it is sought, in this instance, to make the claim arising out of such contract a charge upon said land. This, we think, can be done, after due steps have been taken to ascertain the amount thereof.

That a married woman might, on general principles, bind her separate estate to pay debts contracted for the benefit thereof, see *Murray v. Bailer*, 3 M. and K. 209. *Owens v. Dickinson*, 1 Cr. and Ph. 48. 2 Atk. 69. 15 Vesey, 596.

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Story's *Eq. Juris.*, section 1387. 2 *Roper on Hus. and W.* 171-2. *Method. Epis. Ch. v. Jaques*, 3 *Johns. Ch.* 77. *North Amer. Coal Co. v. Dyett*, 7 *Paige*, 9. *Gardner v. Gardner*, 7 *Paige*, 112. *Curtis v. Engle*, 2 *Sandf. Ch.* 287. *Yale v. Dideroe*, 18 *N. Y.* 265. 7 *B. Mon.* 293. *Conway v. Smith*, 13 *Wis.* *Wooster v. Northrup*, 5 *Wis.* 245.

We have already intimated that, in our opinion, the passage of statutes intended to enlarge the rights of a married woman, perhaps, in law, certainly in equity, should not be construed to operate as a limitation on the rights she before possessed.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

D. S. Major, for the appellant.

J. E. McDonald and *A. L. Roache*, for the appellee.

COWRY and Others *v.* LEWIS.

Where a usurious contract is made under the interest law of 1852, and the debt is renewed by a new note, given under the interest law of 1861, the excess over legal interest paid upon such debt, both before and after the act of 1861, may be recovered by the maker of such contract.

APPEAL from the *Franklin Common Pleas.*

Per Curiam.—The appellee, on the 17th of June, 1861, brought this action against the appellants, who were the defendants, upon a promissory note for the payment of one thousand five hundred dollars. The note bears date May 11th, 1860, and was payable at twelve months, with interest from date. Defendants answered by three paragraphs, each setting up usury. *Reply.* A general denial.

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The Court tried the issues and found, for the plaintiff, one thousand one hundred and ninety-seven dollars and fifty cents, the amount of the note and interest, after deducting the credit thereon. Motion for a new trial denied, and judgment, etc.

Upon the trial, the note, upon which there was the following indorsement: "Feb. 11, 1861. Received, on the within note, four hundred dollars," was given in evidence, and, thereupon, the plaintiff was called as a witness, and testified, in effect, as follows: "In May, 1857, I loaned the defendants one thousand five hundred dollars, for which they gave me their note, payable three years after date, at six per cent. per annum interest thereon. They also paid down, as interest, sixty dollars, and gave me two notes for sixty dollars each, payable in one and two years. The money thus paid, and notes thus given, were for four per cent. on the amount loaned, in addition to the six per cent. specified in the original note. The notes given for interest were paid as they respectively matured; and the six per cent., which amounted to ninety dollars a year, was also paid, making, in all, four hundred and fifty dollars paid as interest on said loan. Witness further testified, that, after the payment of said interest, viz., on the said 11th of May, 1860, the principal sum loaned still remaining unpaid, the defendants, for that sum, executed to him the note in suit, in lieu of the original note, upon which interest, at ten per cent., had been paid, as aforesaid. And, in reference to the last note, there was no undertaking or agreement that plaintiff was to have more than six per cent. for the money."

For the reasons given in *Wood v. Kennedy*, at the present term, the judgment in this case must be held erroneous, the facts and questions of law, in both cases, being similar. In accordance with the rulings in the cited case, the defendant, in the present case, should have been allowed a deduction

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from the note in suit, of the four per cent. paid on the original, over and above the then legal rate of interest; which four per cent., so paid, with interest, amounted, at the time of the rendition of the judgment in the lower Court, to two hundred and fifteen dollars. And if the appellee will remit that sum, then the judgment will stand affirmed. If not, it will be reversed.

The appellant must recover cost in this Court.

Wilson Morrow and Robert M. Goodwin, for the appellants.
George Holland and Charles C. Binkley, for the appellee.

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REYNOLDS *v.* JONES.

In an action by the indorsee against the indorser of a promissory note, not governed by the law merchant, where there has been no suit against the maker, it is sufficient, in order to entitle the plaintiff to recover, to show that the maker was totally insolvent, at the earliest period of time when a judgment could have been recovered against him.

APPEAL from the *Tippecanoe* Circuit Court.

WORDEN, J.—Suit by *Reynolds*, the holder, against *Jones*, the indorser, of a promissory note. Judgment for the defendant.

The question involved in this case is: Whether, in an action by the indorsee against the indorser of a promissory note, not governed by the law merchant, where there has been no suit against the maker, it is sufficient, in order to entitle the plaintiff to recover, to show that the maker was totally insolvent, at the earliest period of time when judgment could have been recovered against him; or whether it is necessary that he should have been thus insolvent at the time the note matured?

Reynolds v. Jones.

The statute provides that "Any such assignee, having used due diligence in the premises, shall have his action against his immediate or remote indorser," etc. 1 R. S., 1852, p. 368, sec. 4.

Under similar statutory provisions, this Court has held, in numerous cases, that the total insolvency of the maker was an excuse for not bringing suit against him; or, in other words, that "due diligence" does not require the holder to sue an insolvent maker, before he can bring his action against his indorser. *Vide, Herald v. Scott*, 2 Ind. 55, and cases there cited. These cases undoubtedly go upon the theory that the holder should not be required to bring a suit that would be wholly unavailing. It seems to follow, that if the maker was totally insolvent, at the time when judgment could be first recovered against him, the recovery of such judgment was not necessary, in order to entitle the plaintiff to recover against the indorser. The maker of a note may have some property when it matures, but if he become totally insolvent before judgment can be recovered against him, such property does not (unless so applied by the maker) pay the debt, nor would a judgment against him be of any avail.

"Due diligence" does not, in our opinion, require a suit to be brought against the maker in cases where a judgment, obtained as soon as it could be done after the note matured, would be wholly unavailing, because of the insolvency of the maker, although he might not have been insolvent at the time the note matured.

We are referred to a *dictum*, to the effect that where no suit is brought against the maker, it is necessary to show his insolvency *at the time the note became due*, in the case of *Dugdale v. Masine*, 11 Ind. 194. No question was involved in that case, as to the precise time when insolvency should be shown to have existed, and it is evident that the remark was thrown in without at all considering the effect of

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insolvency at the time when judgment could have been first recovered.

Per Curiam.—The judgment below is reversed, with costs, and the cause remanded.

Daniel Mace, for the appellant.

D. P. Vinton, H. F. Blodgett, and *J. J. Jones*, for the appellee.

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RICKETTS v. LOSTETTER.

In an action for damages, on account of an eviction by a landlord of his tenant from leased premises before the expiration of the lease, it is competent for the tenant to give evidence of the improvements he had placed upon the premises before expulsion, rendering them more productive, for the purpose of showing the extent of his damage.

APPEAL from the *Ohio Circuit Court*.

Per Curiam.—This suit was commenced before a Justice of the Peace, where technical formality is not required in the pleading. If there be error in the admission or refusal of evidence on the trial of a cause in the Superior Court, it must be made the ground of a motion for a new trial; and then, if the Court refuse the new trial, the party must except.

The instructions are of record, but no exception to the giving or refusing of any one of them was taken. The record does not appear to contain all of the evidence. The suit was to recover damages, by a tenant against his landlord, for expulsion from the premises, for a year of the lease. It was proper for the tenant to give evidence of the improvements he had placed upon the premises before expulsion, rendering them more productive, with a view, at all events, of showing how much the damage to the tenant was,

Vodegal v. Ferran.

in being deprived of their enjoyment for the future year. We see no error in the record.

The judgment is affirmed, with five per cent. damages and costs.

James C. Ricketts, for the appellant.

A. C. Downey, for the appellee.

TUHE v. EBER.

It is error for the judge to receive a verdict out of Court, and discharge the jury, without the consent of the parties.

Per Curiam.—In this case the verdict was received by the judge out of Court, and the jury discharged, without the consent of the parties, so that there was no opportunity to poll the jury. This was error. *Rosser v. McCally*, 9 Ind. 587. *Wright v. The State*, 11 *Id.* 569.

The judgment is reversed, with costs, and the cause remanded, etc.

David Nation and *Thomas S. Walterhouse*, for the appellant.

VODEGAL v. FERRAN.

APPEAL from the *Ripley* Common Pleas.

Per Curiam.—In this case no motion was made to compel the appellee to make his pleadings more certain, nor to strike out any of them. No exception was taken to rulings upon demurrers, to the admission of evidence, or to the giving of instructions.

Myers v. The State.

No questions are presented upon which the judgment below can be reversed.

The judgment is affirmed, with costs.

Edwin P. Ferris, for the appellant.

John Vodegal, for the appellee.

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MYERS v. THE STATE.

In an action upon a recognizance taken and approved by a sheriff, the facts which authorized him to take the recognizance should be averred in the complaint.

APPEAL from the *Allen* Circuit Court.

WORDEN, J.—This was an action by *The State* against *Knott, Kistler, and Myers*, on a recognizance.

The recognizance appears to have been entered into before *William Fleming*, sheriff of *Allen* county, and is conditioned for the appearance of *Knott* at the next term of the Circuit Court, to answer to a charge of larceny. *Myers* demurred to the complaint, but the demurrer was overruled, and he excepted. Such farther proceedings were had as that final judgment was rendered for the plaintiff.

Myers only appeals.

We are of the opinion that the complaint is insufficient, and that the demurrer thereto should have been sustained.

It does not appear, either by averment or inference, that *Fleming* had arrested *Knott* by virtue of any warrant for that purpose, or that he had any other authority to take the recognizance in question. The facts which authorized the sheriff to take the recognizance should have been shown. *Blackman v. The State*, 12 Ind. 556.

Per Curiam.—The judgment, as to *Myers*, is reversed, and the cause remanded.

D. H. and John Colerick, for the appellant.

McGuire v. Callahan.

MARTIN and Another v. ANDERSON and Others.

APPEAL from the *Hendricks* Circuit Court.

Per Curiam.—Complaint for a review of a judgment, by the appellants against the appellees. Demurrer to the complaint sustained. The judgment sought to be reviewed was rendered by default, upon a bill of exchange. The errors complained of in the original judgment are alleged errors of law appearing upon the face of the proceedings. The first is, that a copy of the bill was not set out. This is a mistake; an amendment of the transcript shows that a copy of the bill was filed. The complaint also alleged that the plaintiffs duly presented the bill for payment, and notified the drawer of its dishonor. Indeed, there is no defect in the complaint, nor is there any error in the original judgment, a transcript of which is set out and made a part of the complaint herein.

The judgment below is affirmed, with costs and five per cent. damages.

Nave and Witherow, for the appellants.

L. M. Campbell, for the appellee.

McGUIRE v. CALLAHAN.

A party to a contract can not treat it as good in part and void in part, but he must affirm it, or avoid it, as a whole.

If a party desires to avoid a contract, either on the ground of fraud or drunkenness, he must first place his adversary in the identical situation in which he was before the contract was executed.

APPEAL from the *Vigo* Common Pleas.

WORDEN, J.—Action by *Callahan* against *McGuire*, for goods sold and delivered, etc.

McGuire v. Callahan.

Trial; verdict and judgment for the plaintiff.

The case is before us on the evidence, which strongly preponderates in favor of the defendant, though, in some respects, it is conflicting. There is one particular, however, in which it totally fails to sustain the verdict. The plaintiff had executed to the defendant the following instrument, in writing, viz:

“In consideration of my indebtedness to *Andrew McGuire*, and the costs of his suit against me, and certain claims which the said *McGuire* agrees to pay for me, I have sold, and do hereby sell, convey, and deliver to the said *McGuire*, the canal boat *Bremen* and fixtures; one black pony, inclined to be roan, with three white feet, blaze face; and one bay roan horse, belonging to said canal boat *Bremen*, and the harness and saddles to the horses; to have and to hold the same to the said *McGuire* forever. In witness whereof, I have signed my name, this 30th day of November, 1860.

“JAMES CALLAHAN.”

This suit was brought to recover the value of the property embraced in the foregoing instrument. The plaintiff seeks to avoid the instrument, on the ground of fraud and drunkenness. He can not, however, treat the instrument as void, and, at the same time, as good. If the instrument is good, the plaintiff can maintain no action to recover the value of the property thus sold, if the defendant has performed the stipulations to be by him performed, which, for aught that appears, he has done. If the instrument is voidable, either on the ground of fraud or drunkenness, the plaintiff, before he can avoid it and maintain an action for the value of the property thus transferred, must place the defendant in *statu quo*, by refunding to him what he has advanced in pursuance of the contract. *Teter et al. v. Hinders et ux.*, at the present term. 2 Story on Cont., sec. 844 a. 2 Parsons on Cont., 192. This doctrine, in our opinion,

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is as applicable to contracts voidable on the ground of drunkenness, as those voidable on the ground of fraud. Drunkenness does not make a contract void, but only voidable. 1 Story on Cont., sec. 45, and authorities in note 4, p. 86.

In the case of *Arnold v. Richmond Iron Works*, 1 Gray, 434, it was held that a deed conveying land, executed by a person of *unsound mind*, is voidable only and not void; and in order to avoid it, on being restored to his right mind, he must surrender the price, if paid, or the contract for its payment, if unpaid. The Court say it must be affirmed or avoided as a whole. It can not be affirmed in part, so as to hold the price, and disaffirmed in part, so as to avoid the conveyance.

It appears, by the evidence, that the defendant, in pursuance of the contract, has not only received a judgment which he held against the plaintiff, but that he has paid several sums of money to third persons for him, which have not been refunded or offered to be refunded. The plaintiff can not thus retain the benefit of the contract on the one hand, and repudiate it on the other.

Per Curiam.—The judgment below is reversed, with costs, and the cause remanded.

William Mack and B. B. Moffatt, for the appellant.

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MATLOCK *v.* TODD.

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Where a new trial is asked, on account of alleged misconduct of the jury, which is presented to the Court below in the form of affidavits, and the new trial is denied, and the refusal is assigned for error in this Court, such affidavits will not be considered as constituting a part of the record of the cause, unless made so by a bill of exceptions.

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See the opinion at length, as to what matters will be considered as properly and naturally constituting parts of the record, without a bill of exceptions.

Sale by one partner of his interest in the partnership stock and business. The seller represented to the purchaser that he had put into the firm one thousand two hundred and forty dollars in cash, and the firm had purchased forty thousand dollars worth of goods, on which they supposed they had made twenty-four per cent. profits, and he told the purchaser he could inquire of the clerks and other partners at the store, but the purchaser did not do so, believing that he could not thereby obtain satisfactory information, and concluded not to buy; but some time afterward, the seller called on him again, and told him, if he was hesitating about the amount, he need not, for it was every dollar there; and the purchaser replied, that was just what he was hesitating about, but if he said it was all there, he would trade, and the trade was then made; but it soon turned out that the seller had put in twelve hundred and forty dollars, and the firm had purchased forty thousand dollars' worth of goods, but the seller's interest in the whole concern, for some reason not explained, was worth about one thousand eight hundred dollars, instead of three thousand six hundred dollars.

Held, that under the circumstances, the purchaser bought, reasonably relying on the representations of the seller, which, if false, would entitle the purchaser to rescind or recover damages.

Held, also, that a contract may be set aside for fraudulent misrepresentations, though the means of obtaining information were fully open to the party deceived, where, from the circumstances, he was induced to rely upon the other party's information.

APPEAL from the *Hendricks* Common Pleas.

PERKINS, J.—*Matlock* sued *Todd* on a note for a fraction over eight hundred dollars. *Todd* answered, that the note was obtained by fraud, in this, that it was given for the consideration, in part, of the purchase of the interest of *Matlock* in a certain partnership; that the purchaser, *Todd*, relied upon the representations of *Matlock*, as to its value, etc., and that

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the representations were false, etc., and that said *Todd*, immediately upon discovering their falsity, offered to rescind, etc.

Reply in denial. Jury trial; judgment for the defendant.

A motion was made for a new trial. It was asked on two grounds, viz.: That the verdict was not sustained by the evidence, and that the jury misbehaved themselves in their retirement. The affidavits showing the misconduct of the jury were not natural, necessary parts of the record of the cause, and were not made a part of the record by bill of exception; and we can not, therefore, notice that ground for a new trial. But see, in reference to it, as presenting analogy, the cases of *Ball v. Cosley*, 3 Ind. 577, and *Bersch v. The State*, 13 *Id.* 434. See also, 1 Gra. & Wat. on New Trials, 74, from which it would seem, that when jurors take papers with them in their retirement, by mistake, and do not read them, and are not influenced by them, the fact does not furnish a ground for a new trial. This accords with the above decision, cited from our own reports.

It is not shown, by a bill of exceptions, that a motion was made for a new trial, and, of course, it is not so shown that it was overruled and exception taken. But we think this is not necessary. The code provides, that where, in the progress of a cause, the decision objected to is entered on the record, that is, when it is a necessary part of the record, and the grounds of objection appear in the entry, the party may cause it to be noted at the end of the entry of the decision, that he excepts, and that such entry shall be sufficient. 2 G. & H. 209. Now, pleadings must be entered of record. The complaint, answers, demurrers, etc., must be filed by the clerk, and they constitute a part of the record proper. The journal entry, by the clerk, of their filing, is, also, necessarily a part of the record. And where a demurrer is filed to a pleading, the demurrer, as we have said, is a natural part of the record; the entry, by the clerk, of its filing, is so also; and so is the action of the Court in sus-

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taining or overruling it. And as the demurrer must assign causes, the ground of the decision of the Court upon it appears necessarily, as a general rule, in such cases, in the journal entry of the decision by the clerk, considered in connection with the demurrer. Hence, a bill of exceptions, in such cases, is not necessary. It is only necessary that the party cause it to be noted that he excepts. So, the statute now requires written charges given or refused by the Court, to be filed as a part of the record, and authorizes exceptions in reference to them to be entered and signed by the attorney at the close of each charge, and the Supreme Court takes notice of such exceptions without their appearing in a bill of exceptions proper. 2 G. & H., p. 201.

So, the statute now requires a motion for a new trial to be in writing; hence, it places on the record the ground on which it is asked, and the journal entry, by the clerk, of its filing, it being, by statute, a necessary paper in the record of the cause, is a part of the record, as is the entry of the ruling of the Court upon the motion; and the grounds of the ruling, or decision, will, necessarily, sufficiently appear in the entry, taken in connection with the written motion specifying the grounds of it. See *Kirby v. Cannon*, 9 Ind. 371. Hence, this Court will take notice of an exception to such ruling, where the exception is noted at the end of it, without a bill of exceptions. There is a bill of exceptions in the record containing the evidence. We have, then, a motion for a new trial, which is, necessarily, a part of the record. We have the journal entry of the clerk, that the motion was overruled, which is, also, a natural part of the record; we have the exception of the party noted at the end of the ruling, and we have all the evidence given in the cause, in a bill of exceptions.

One ground upon which the new trial was asked was, that the evidence did not sustain the verdict of the jury. This question is now before us. As we have seen, the note sued

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on was given for the last payment on the purchase, by *Todd* of *Matlock*, of the interest of the latter in a firm of merchants. The value of *Matlock's* interest was put at three thousand six hundred and forty dollars; and that value was arrived at in this way. *Matlock* told *Todd* he put into the firm one thousand two hundred and forty dollars in cash; that the firm had purchased forty thousand dollars worth of goods, and that they supposed they had made twenty-five per cent. on them. *Matlock* told *Todd* he could inquire of the clerks, and the other partners at the store. But it seems *Todd* did not do it to any great extent, and thought he could not obtain very satisfactory information if he did. The parties did not then trade; but, a few days afterward, *Matlock* called on *Todd* about the matter. *Todd* told him he was not in the notion of trading. *Matlock* said to him, if he was hesitating about the amount, he need not, for it was every dollar there. *Todd* replied that that was just what he was hesitating about; but if he, *Matlock*, said it was all there, he would trade. *Matlock* replied that it was, every dollar, there. The trade was made. It turned out, on taking an account and inventory, that *Matlock* had put in one thousand two hundred and forty dollars; that the firm had purchased over forty thousand dollars worth of goods, but that *Matlock's* interest in the concern, for some reason not explained, was but about one thousand eight hundred dollars, instead of three thousand six hundred dollars. *Matlock* says he did not mean to be understood by the expression that "it was all there," that the three thousand six hundred and forty dollars were there, but only that the one thousand two hundred and forty dollars, and the amount of goods purchased, and the proceeds of them, were there. *Todd* understood it that the three thousand six hundred and forty dollars were there; and as the question would be for the jury, as to how *Todd* might have understood it, and they found for him, we must act upon his understanding of

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the facts of the case. *Lanna v. Gregg*, 1 Met. (Ky.) 444. Thus acting upon the facts, we think a case is made where *Todd* purchased, reasonably relying on the representation of *Matlock* as to a material point, which representation was false, and which the jury might have inferred *Matlock* knew to be so; at any rate, he did not know it to be true. *Gatling v. Newell*, 9 Ind. 572. See *Fry* on *Specif. Perf.*, 2d ed., p. 269.

“But a contract may be set aside for fraudulent misrepresentations, though the means of obtaining information were fully open to the party deceived, where, from the circumstances, he was induced to rely upon the other party's information. *Reynolds v. Sprye*, 8 Hare, 222. Aff'd. 21 L. J. N. 633. 1 De G. M. and G. 660.” *Adams' Eq.*, p. 422, in note.

It may be mentioned that *Todd* offered to rescind immediately on discerning the fraud.

Per Curiam.—The judgment is affirmed, with costs.
J. E. McDonald, A. L. Roache, P. S. Kennedy, and O. A. Bartholomew, for the appellants.

L. M. Campbell and John T. Dye, for the appellee

MACEY and Others v. TITCOMBE.

Suit on a written instrument, in these words: “*David Macey and James Turner* against *The City of Indianapolis* and *Daniel Titcombe*. We undertake that the plaintiffs, *David Macey and James Turner*, shall pay to the defendants, *The City of Indianapolis* and *Daniel Titcombe*, all damages and costs which may accrue by reason of the injunction in this action. This 30th day of October, 1859. *David Macey, James Turner, J. W. Patterson, Wm. Wilkison*. Approved by me, this 31st day of October, 1859. *John Coburn, Judge Court Com. Pleas, M. C.*”

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Held, that in order to make it appear that the injunction was not rightfully obtained, and that Titcombe sustained legal damages from its issue, the complaint should show, affirmatively, that a legal contract for the improvement of the street was entered into by the city with Titcombe; but the complaint need not aver that the city had power to improve the streets, as the Court takes judicial notice of the existence of such power.

In suits for injunctions upon the performance of contracts for the improvement of streets in cities, and in suits upon injunction bonds arising out of them, the regularity of all the proceedings, up to the making of the contract, is open to investigation; but the judicial determination of their regularity in one, might be conclusive upon the trial as to the other suit.

APPEAL from the *Marion* Circuit Court.

PERKINS, J.—Suit upon a written instrument, reading thus:

“*David Macey and James Turner v. The City of Indianapolis and Daniel Titcombe.*

“We undertake that the plaintiffs, *David Macey* and *James Turner*, shall pay to the defendants, *The City of Indianapolis* and *Daniel Titcombe*, all damages and costs which may accrue by reason of the injunction in this action. This 30th day of October, 1859.

“DAVID MACEY,
“JAMES TURNER,
“J. W. PATTERSON,
“WM. WILKISON.

“Approved by me, this 31st day of October, A. D. 1859.

“JOHN COBURN, Judge Court Com. Pleas, M. C.

“Filed October 31. JOHN C. NEW, Clerk.”

This instrument does not disclose the consideration upon which it was executed, and, independent of extrinsic facts, does not constitute a cause of action. The pleader, in commencing suit upon it, is aware of this, and undertakes to show the consideration. He avers that the city had made a contract with *Titcombe* for the grading and graveling a

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certain street in *Indianapolis*, and that the written instrument sued on was executed upon the granting of an injunction upon the performance of the contract by *Titcombe*.

The complaint does not stop here. It undertakes to set out the facts under which the contract was executed.

Now, to make it appear that the injunction was not rightly obtained, and that *Titcombe* sustained legal damage from its issue, a legal contract for grading the street must be shown. To make such showing, it is not necessary for the complaint to aver that the city had power to improve the streets, as the Court takes judicial notice of that, the charter of the city being a public law. But it is necessary that the complaint should show that a legal contract, for the improvement of the street, was entered into by the city, with *Titcombe*. The complaint shows that the improvement in question was ordered, by the city council, to be made in the manner prescribed by the charter, and that a contract was entered into, with *Titcombe*, for making it; but it fails to show that between the ordering of the improvement, and the contracting for its execution with *Titcombe*, an advertisement for bids for its construction was published. Without such advertisement the contract was void. City Charter, sec. 66. 2 G. & H. 233. *Bonesteel v. The Mayor, etc.*, 22 N. Y. Court of App. 162, and cases cited.

However it may be in a suit against lot-owners to recover assessments for work done under contract, there is no doubt but that in suits for injunctions upon the performance of contracts, and in suits upon injunction bonds, the regularity of all the proceedings, up to the making of the contract, is open to investigation. If the question upon their regularity had been judicially determined in one, it might be conclusive upon the trial of the other suit. But the complaint in the suit on the bond must show a legal contract to have been enjoined.

The demurrer to the complaint, because it did not state
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facts constituting a cause of action, should have been sustained.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, with leave to amend, etc.

N. B. and C. Taylor, for the appellants.

S. Major, for the appellee.

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EVERHART and Another v. HOLLINGSWORTH.

When several defendants jointly demur to a complaint for defect of parties defendant, if there is one defendant who is unobjectionable as a party, the demurrer should be overruled.

This Court will not reverse a judgment for error in sustaining or overruling a demurrer for misjoinder of causes of action.

A bill of exceptions, not filed during the term of the Court below, nor thereafter with special leave of the Court, can not be considered a part of the record.

The judge of the Lower Court can not, out of term, grant leave to perfect a bill of exceptions, or extend the time for perfecting it, at his own instance.

APPEAL from the *Grant* Circuit Court.

DAVISON, J.—*Hollingsworth* was the plaintiff below, and *Harris* and *Everhart* were the defendants. The complaint consists of two counts. The facts alleged in each count are, in effect, the same, and are, substantially, as follows: Plaintiff was the owner of a steam saw-mill and the land on which it is situate, the same being of the value of three thousand dollars, and described as lots numbered 3, 4, and 11, in the town of *Galatia*, *Grant* county. *Harris*, one of the defendants, intending to defraud the plaintiff out of his said property, procured *Everhart*, the other defendant, to conspire with him in carrying out his fraudulent intent and

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purpose. And, in furtherance of the conspiracy thus formed, he, *Harris*, conveyed to *Everhart*, by deed in fee simple, but without any consideration whatever, a tract of land in *Stark* county, known as the south-east quarter of section 2, in town 32, of range 2 west. After this, *Everhart*, by the direction of *Harris*, called upon the plaintiff, and represented to him that he was the *bona fide* owner of the *Stark* county land, and that he desired to exchange it for the plaintiff's mill property; and further, he represented to plaintiff that said land was "good, dry, rich, and tillable, one-third of it well-timbered, and the residue good, dry, rich prairie land," of the value of three thousand dollars. Plaintiff avers that said *Stark* county land was situated ninety miles from his residence; that he had no convenient means of ascertaining the truth of the above representations, and had not, at any time, any knowledge whatever of the value and quality of the land in question, and he, plaintiff, being thus ignorant of the conspiracy between the defendants to defraud him, and of the value and quality of the land, he was induced to, and did rely implicitly, on the aforesaid representations, and was thereby further induced to, and did exchange, his mill and lots for the above described land. Pursuant to the exchange thus made, he, the plaintiff, by deed, conveyed the mill property to *Everhart*, who, in like manner, conveyed the *Stark* county land to the plaintiff. It is averred that *Everhart*, within ten days after he received plaintiff's deed, conveyed, without any consideration whatever, the same mill and lots to *Harris*, who had, immediately after said exchange, taken possession of the said mill property, and still retains possession thereof, realizing large profits, etc. And the plaintiff, in fact, says that said representations as to the ownership, value, and quality of the land conveyed to him, were false and fraudulent in this, that *Everhart* was not the *bona fide* owner of said land, but received a deed therefor from *Harris*, in pursuance of the

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aforesaid conspiracy between them to defraud the plaintiff; that the land in question is not "good, dry, rich, and tillable;" nor is one-third of it well timbered; but, on the contrary, the same is a miserable swamp, destitute of timber, and wholly worthless; all which, etc., was known to the defendants, but unknown to the plaintiff, etc. Wherefore the plaintiff avers that, by reason of the premises, he hath sustained damages, etc.

Defendants demurred to the complaint on three grounds:

1. There is a defect of parties defendants.
2. The complaint does not state facts sufficient to constitute a cause of action.
3. Several causes of action have been improperly joined; but their demurrer was overruled, and they excepted.

Upon the first ground of demurrer, it is insisted that there is no cause of action against *Harris*, and that he should not, therefore, have been made a defendant. This objection, though it may exist, is not, in this instance, available, because the defendants have joined in the demurrer, and, in that case, if there be one defendant who is unobjectionable, as a party, the demurrer should be overruled. It is conceded that *Everhart* is properly made a defendant, and *Harris*, to have availed himself of his improper joinder, as a party, should have demurred separately. *Pace v. Popenheimer*, 12 Ind. 533. *Teter et al. v. Hinders et al.*, at the present term.

We perceive nothing in the second assigned cause. The facts alleged in the complaint are sufficient, if proved, to sustain the action. And, as to the third assignment, it is enough to say that "for an error in sustaining or overruling a demurrer for misjoinder of causes of action," a judgment can not be reversed. 2 R. S., p. 88, sec. 52.

All the remaining assignments of error are based upon what purports to be a bill of exceptions, the validity of which is contested by the appellee. The record shows that

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this cause was tried at the August term, 1859, of the *Grant* Circuit Court; but it fails to show that the bill in question was filed in the cause at that term, nor does it show that any leave was granted the defendant to file a bill at or within a period beyond the term. The bill of exceptions, upon which the appellant relies, and which is copied in the transcript, appears to have been signed by the judge, in vacation, on the 14th of October, 1859, and, on that day, filed in the clerk's office. The judge, at the close of the bill, and immediately preceding his signature, states thus: "And this bill of exceptions is perfected within the time given by the Court to perfect the same, as extended by the Court at its own instance."

The code provides, that "The party objecting to a decision must except at the time it is made; but time may be given to reduce the exceptions to writing; but not beyond the term, unless by special leave of the Court." 2 R. S., p. 115, sec. 343. Here, then, the record fails to show that leave was granted to file a bill of exceptions "beyond the term," and that being the case, the bill in question can not be considered a part of the record, because it appears to have been filed after the term. This, in our judgment, accords with a proper construction of the statute. *Howard v. Burk*, 14 Ind. 35. *Peck v. Vankirk*, 15 Id. 159. Nor was it competent for the judge, out of term, to grant leave to perfect such bill, or to extend the time for perfecting it "at his own instance." The bill of exceptions, then, not being properly in the record, the errors founded upon it can not, therefore, be noticed.

Per Curiam.—The judgment is affirmed, with costs.

A. Steele, H. D. Thompson, J. Van Devanter, J. F. McDowell, and *A. W. Sanford*, for the appellants.

H. S. Kelley and John Brownlee, for the appellee.

Daggy v. Cox.

DAGGY v. COX.

Where a party contracts to sell and deliver to another a specified number of fattened hogs, "*to be of his best hogs*, weighing two hundred pounds and upward," the purchaser is not obliged to receive any but hogs fattened and prepared for the market by the seller himself.

The facts, that the stipulated number of hogs, in part fattened and prepared for market by the seller, and in part by other persons, were weighed in the presence of the purchaser's agent, without objection, and the purchaser offered to take them, provided the seller would receive, in part payment, certain certificates of deposit, which he refused, and the purchaser then refused to take them, "as they did not fill the contract," do not amount to a waiver of the purchaser's right to insist upon the kind of hogs contracted to be delivered.

APPEAL from the *Montgomery* Circuit Court.

DAVISON, J.—*Daggy* was the plaintiff below, and *Cox* the defendant. The complaint consists of three counts. The first is upon a written contract, in this form:

"LADOGA, Aug. 4, 1860.

"We, the undersigned, bargain and sell to *Addison Daggy* the number of hogs opposite our respective names; said hogs to be well fatted, and in merchantable condition; said hogs to be weighed between the 20th of November and 20th of December; said hogs to be *our best hogs*, weighing two hundred pounds and upward, for which *Addison Daggy* agrees to pay four dollars per one hundred pounds gross, to be paid in par bankable paper, when the hogs are weighed, with one dollar per head in advance.

Names.	Number of Hogs.	Amount paid.
" JAMES KNOX,	15	\$15 00
" DANIEL H. COX,	65	\$180 00."

The plaintiff avers, that when this contract was executed

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he advanced to the defendant, upon the sale of the sixty-five hogs, one hundred and thirty dollars, and that afterward the defendant, verbally, added four other hogs to the sale, on the terms specified in the written contract, and received from the plaintiff an advance of eight dollars on the four additional hogs, thereby making the number of hogs actually sold sixty-nine, and the sum advanced one hundred and thirty-eight dollars. And further, the plaintiff avers that, on his part, he has kept and performed said contract, and was ready and willing to receive the hogs; but that the defendant failed and refused to deliver them, as, by the contract, he was bound, etc.; wherefore, etc.

The second count is also upon the written contract, and is, in substance, the same as the first. And the third count is for money had and received.

Defendant answered: 1. By a denial. 2. That he kept and performed all the stipulations in said contract, on his part to be kept and performed, and was ready and willing, and offered to deliver to the plaintiff the *number and quality* of hogs specified in the contract, and weighed out the same to the plaintiff; but he refused to receive or pay for the hogs, etc. Whereby defendant was greatly damaged in this, that he was compelled to, and did, sell the hogs for a price lower than the said contract price, to-wit, for three dollars per one hundred pounds gross; and defendant, in fact, says that, by reason of the premises, he has sustained damage to the amount of four hundred dollars, for which he claims judgment, etc.

Reply by a general traverse. The issues were submitted to the Court, who found, specially, as follows:

The plaintiff, on the 4th of August, 1860, advanced to defendant one hundred and thirty-eight dollars, on sixty-four hogs, then sold to him by defendant, and, on the 17th of December, 1860, he called on the defendant and told him that he could not take the hogs unless he, defendant, would

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receive, in part payment for the hogs, certificates of deposit in the *Branch Bank* at *New Albany*, at four months, and the residue in money. To this the defendant replied, that he did not think he could take any thing but money, but he would see; and thereupon agreed to meet the plaintiff at the place of weighing, on the twentieth of that month, and then determine whether he would receive the certificates of deposit. At the appointed time, to-wit, the 20th of December, the defendant brought to the place of weighing fifty-eight hogs, of his own feeding and fattening, and, in addition, eleven hogs which he had not fed, but had purchased with a view of putting them in on the contract, making, in all, sixty-nine hogs, the number for which the plaintiff contracted. These hogs were, on the last-mentioned day, tendered to the plaintiff. One *Thomas G. Maiden*, as agent for the plaintiff, attended to the weighing. After the hogs were weighed, the defendant and *Maiden* went to a house near by, where the plaintiff was settling with other persons, and thereupon defendant asked the plaintiff what he would do about taking the hogs? and plaintiff replied, that he would take them if he, defendant, would receive said certificates of deposit in part payment, and the residue in money. This the defendant refused to do, saying that he owed money that he would be compelled to pay. Plaintiff then said that he would not take the hogs unless he, defendant, took said certificates and money, as they did not fill the contract. When the hogs were weighed and offered, as aforesaid, plaintiff made no objection to receiving them, on account of there being among the number weighed and tendered certain hogs which were not of the defendant's own fattening. The plaintiff, at the time, had money on hand sufficient to pay defendant for the hogs, but he made no offer to pay the money.

The difference between the contract price of the hogs and the market value thereof, less the money advanced, was, and is, in favor of defendant, fifteen dollars seventy cents.

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And for that amount the Court found generally for the defendant. Plaintiff moved for a new trial, but his motion was overruled, and judgment accordingly rendered, etc.

Among the various errors assigned upon the record, the one mainly relied on for a reversal, is: "That the special finding is inconsistent with the general finding." Thus, the defendant, by his contract, agreed to deliver sixty-nine hogs, "to be of *his* best hogs, weighing two hundred pounds and upward," while the special finding is, that defendant had, at the place of delivery, only fifty-eight hogs of his own feeding and fattening, and that, to make up the number sixty-nine, he bought eleven, after the date of the contract, which he had not fed or fattened, and which, with the said fifty-eight, were weighed and offered to the plaintiff. As we construe the contract in evidence in this case, "it points to, and was intended by the parties to embrace, the hogs fattened and prepared for market by the defendant, and not those that may be bought by him, that had been fattened and prepared for market by others." This construction accords precisely with that given to a similar contract in *Mason v. Cowan*, 1 B. Monroe, 7; and that case, so far as it relates to the point under consideration, has been referred to, with approval, by this Court. See *Alexander v. Dunn*, 5 Ind. 122, and *Bales v. Waddle*, 14 Ind. 349. But the appellee contends that the plaintiff, in this case, waived his right, under the contract, to insist on the delivery of hogs fed and fattened by the defendant himself, and that his offer to furnish other hogs "to fill the contract, was, therefore, a sufficient compliance." This conclusion seems to be incorrect. The hogs, it is true, were weighed in the presence of plaintiff's agent, without objection, and the plaintiff offered to take them, provided the defendant would receive, in part payment, certificates of deposit. The defendant refused to receive the certificates, and the plaintiff then stated, that unless he could so pay for the hogs, he would

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not take them, "as they did not fill the contract." This is, substantially, the transaction as it occurred. And we perceive nothing in it, or in the entire special finding, in any degree tending to show that the plaintiff waived any of his rights under the contract.

Per Curiam.—The judgment is reversed, with costs, and the cause remanded for further trial.

Addison Daggy, for the appellant.

J. E. McDonald and *A. L. Roache*, for the appellee.

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JOHNSON *v.* SAAM and Another.

APPEAL from the *Floyd* Circuit Court.

Per Curiam.—The appellant, who was the plaintiff, sued *Charles Meyer* and *Frederick Saam* for trespass *quare clausum fregit*. Proper issues having been made, the cause was submitted to a jury, who found for the defendants. Plaintiff moved for a new trial, on the single ground "That the verdict was unsustained by the evidence." The evidence is upon the record. We have examined it carefully, and are of opinion, though it is, to some extent, conflicting, that the weight of it accords with the verdict.

The judgment is affirmed, with costs.

John M. Wilson, for the appellant.

Thomas L. Smith and *M. C. Kerr*, for the appellees.

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BARKER *v.* MORTON.

The lien for taxes does not attach on personal property until the duplicate is delivered to the collector.

Barker v. Morton.

APPEAL from the *Marion* Common Pleas.

Per Curiam.—The question in this case is, whether the lien for taxes attaches upon personal property before the duplicate is delivered to the collector, and we think it does not.

Each man is assessed for the property, real and personal, which he owns on the first day of January. The amount of his taxes depends upon the amount of his property on that day, (1 G. & H., p. 71, sec. 13,) though he may not, at the time he is actually assessed, be the owner of the property for the value of which he is assessed. Taxes are a lien upon real estate from the first day of January. *Id.*, p. 99, sec. 112. As to personal property, the statute fixes no time. Indeed, it only inferentially creates a lien upon it at all.

But, in collecting taxes by legal process, the collector first seizes and sells all personal property belonging to the owner at the time he makes the levy. *Id.*, secs. 96 to 101. Now, suppose such property had been purchased since the first of the preceding January, and suppose the person who owned it at that time not to pay his taxes, and suppose the lien for his taxes attached at that time, could it be sold again, and taken away from the purchaser who bought it at a tax sale against the owner at the time of the sale? These two doctrines, both held to be coexistent, would produce utter confusion. And further, sec. 100, p. 98, 1 G. & H., authorizes the collector to seize all the personal property of a tax-payer for the payment of his taxes, at any time after the duplicate is received, if he shall deem it necessary to insure the payment of the taxes of the then owner of the property.

Again: taxes are not assessed against specific articles of personal property by description, but on the aggregate number, quantity, and value. Take money, take a stock of goods or manufactured articles, the tax-payer is assessed for what

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he owned on the first day of January; but the merchant and the manufacturer have been all the season selling to customers, and the particular articles of personal property they then owned were not described in the assessment, and could never be identified, while such articles as they might own when the collector called, though never assessed, would be liable for their taxes.

Real estate is immovable, is identified in assessment, the record discloses the lien on each parcel, and the purchasers can easily protect themselves.

The judgment below is affirmed, with costs.

David McDonald, for the appellant.

Wm. Henderson, and *Keitcham and Mitchell*, for the appellees.

PATTERSON and Others *v.* REYNOLDS.

The person, making a Sinking Fund Commissioners' sale, made proclamation of the terms and conditions of said sale, standing, at the time, from two to four feet from the outer door of the court-house, in Indianapolis, on the court-house steps, in front of the door aforesaid, and then announced to the persons attending said sale, that, while crying said sale, he would stand inside the court-house door, on account of the inclemency of the weather, and he then went into the court-house and took a position in the judge's stand, which was just opposite the door of said court-house, and about fifty-three feet therefrom, in full view and hearing of persons at the door, and all the commissioners being present, in offering for sale, he first read the description of the land, and stated the amount due, and then inquired who would give that sum in cash for the first eighty acres in the mortgage, and receiving no bid, he then inquired who would give that sum for the second eighty acres in the mortgage, and receiving no bid, he then inquired who would give that sum for both tracts together, and receiving no bid, he

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then inquired who would give that sum for the whole property, on a credit of five years, and, on receiving an affirmative answer, the land was declared forfeited, and bid in for the State; and he then inquired if any one would bid the amount bid by the State, for any less quantity than the whole, on said credit, and receiving no bid, he then sold the whole to the highest bidder, on said credit.

Held, that such sale was substantially at the court-house door, and was valid.

APPEAL from the Tippecanoe Circuit Court.

Per Curiam.—Proceeding to set aside a Sinking Fund Commissioners' sale. The sale was set aside below, mainly on the ground that it was not made at the court-house door, in Indianapolis, as, it was assumed, was required by law.

The facts touching the place and manner of sale are, substantially, these: “*John F. Carr*, one of said commissioners, who cried said sale, made public proclamation of the terms and conditions of said sale, standing, at the time, about from two to four feet from the outer door of the court-house, in Indianapolis, in this State, on the court-house steps, in front of the door aforesaid, and then announced to the persons attending said sale, that, while crying said sale, he would stand inside of the court-house door, on account of the inclemency of the weather, and that he immediately went into the court-house and took a position in the judge's stand, which was, at that time, immediately opposite the outer door of said court-house, and about fifty-three feet therefrom, on the same floor, in full view and hearing of persons at the court-house door, and that he occupied that position in full view and hearing of persons at the said court-house door, when the land in question was offered and sold, both to the said State of *Indiana* and to said *William Patterson*.” There were about one hundred and fifty persons in the court-house. “*Carr*, the commissioner who cried the sale, all the other commissioners being present, first read the description of the lands as described in the

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mortgage of both tracts, and then stated the amount due; he then inquired who would give that amount in cash down for the first eighty acres described in the mortgage. There was no bid; he then asked who would give the amount due in cash down for the second eighty acres described in the mortgage. There was no bid; he then inquired who would give the amount due for the whole of both tracts together in cash down. There was no bid; he then inquired if there was any person present who would give the amount due for the whole property on a credit of five years, and on receiving an affirmative answer, the said land was then declared forfeited, and bid in for the State of *Indiana*, for the amount due. He then asked if any one would bid the amount for which the land had been bid in for the State, for a less quantity than the whole, on a credit of five years. No one offered to do so. It was then sold to the defendant, *William Patterson*, the highest bidder, 'on a credit of five years."

We think the sale was, substantially, at the court-house door, but do not decide that it could have taken place, under the statute, at no other point in Indianapolis, had the advertisement named another point. See *Perkins v. Spaulding*, 2 Gibbs' (Mich.) Rep. Nor do we decide that the sale may not be void for other circumstances not appearing herein. See, in connection with this case, *Maynes v. Moore*, 16 Ind. 116. *Bansemer et al. v. Mace et al.*, 18 *Id.*, p. 27.

The judgment is reversed, with costs. Cause remanded for another trial.

R. C. Gregory and *William Patterson*, for the appellants.
Huff and Jones, for the appellee.

Mattix v. Weand and Others.

LEFLER and Others *v.* ROBINSON.

APPEAL from the Jasper Common Pleas.

Per Curiam.—Robinson, who was the plaintiff, sued Robert B. Overton, John Lefler, Sen., William Overton, and John Lefler, Jr., upon a promissory note for the payment of one thousand and twenty-six dollars. The note bears date July 19th, 1859, and was payable on the 25th of December then next following. The record shows that process was duly served upon all the defendants; that against two of them, John Lefler, Sen. and William Overton, judgment, by default, was duly entered; and that Robert Overton and John Lefler, Jr., the other defendants, appeared and confessed a judgment for the amount due, etc., and judgment was, accordingly, rendered against all the defendants. As no exception, in any form, was taken to the rulings of the lower Court, the appeal must be dismissed.

The appeal is dismissed, with costs

Milroy and Fatman, for the appellants.

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129 488MATTIX *v.* WEAND and Others.

The taking of a mortgage to secure the payment of purchase money, is an abandonment of the vendor's equitable lien for the same.

The equitable lien for purchase money, once fairly and voluntarily abandoned, is lost forever.

The surrender of a mortgage, voluntarily, on a fair contract, for other security, is an abandonment of the same, and does not revive the equitable lien.

APPEAL from the Clinton Circuit Court.

PERKINS, J.—Samuel Mattix owned a piece of real estate,

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and sold it to *Charles Wolf*. He took a mortgage for unpaid purchase money. That act was an abandonment of the vendor's equitable lien. Adams' Eq., Am. ed., p. 341, note. Williams on Real Prop., Am. ed., p. 362, note. *Harris v. Harlan*, 14 Ind., p. 439.

An equitable lien for purchase money, once abandoned, fairly and voluntarily, is abandoned forever.

Subsequently, *Mattix* gave up and satisfied his mortgage, taking the individual note of one *Weand*, in lieu of it, as his security for his money. He thereby relinquished his mortgage lien, the surrender of the mortgage having been voluntary, upon a fair contract.

This suit was instituted by *Mattix*, on the hypothesis that he could fall back upon a vendor's lien, and for the enforcement of such a lien, in this case.

The Court below rightly held that it would not lie.

Per Curiam.—The judgment is affirmed, with costs.

J. N. Sims, for the appellant.

R. P. Davidson, J. E. McDonald, and *A. L. Roache*, for the appellees.

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RISK *v.* THE STATE, *ex rel.* Vestal.

The State may appeal in prosecutions for bastardy without filing a bond.

In such prosecutions it is error to permit the State to give in evidence the illegitimate infant for the purpose of enabling the jury to determine its paternity, by comparison of it with its alleged father.

APPEAL from the *Ripley* Common Pleas.

Per Curiam.—This was a prosecution for bastardy. The State appealed without filing a bond. We have compared

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the Statutes of 1852, on the subject of bastardy, costs, relators, and appeals, with our previous statutes, under which it was held, the State might appeal in bastardy cases without a bond, and we discover no substantial difference between them. We think the appeal was well taken. See *Neff v. The State*, 3 Ind. 564.

On the trial, the State gave the bastard child in evidence, so that the jury might compare it with the defendant, who was present; this was done without objection, and the Court instructed the jury that if they discovered a resemblance between the child and the defendant, they might regard it as a circumstance tending to prove its paternity; tending to prove that the defendant was its father. We doubt the right to introduce the child in evidence. We have seen no authority on the point. It would be an uncertain rule of evidence. It would involve the necessity of giving the alleged father in evidence. A child changes often and much in looks, in the first three months of its existence. But, in this case, as the evidence went in without objection, the jury had a right to consider it.

The judgment is affirmed, with one per cent. damages and costs.

H. W. Harrington and J. G. Burkshire, for the appellant.

FRANCIS and Another *v.* WEBB and Others.

APPEAL from the *Shelby* Common Pleas.

Per Curiam.—The defendants filed a paragraph of an answer. The plaintiffs demurred to it. Before the demurrer was ruled upon by the Court, the defendants filed an amended paragraph, based on the same matter of defense as the orig-

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inal. On the amended paragraph, issue of fact was joined. The cause was submitted to the Court. Final judgment for the plaintiffs. No error appears. See the cases in 2 G. & H., p. 78.

The appellants contend that the judgment is some eighteen dollars too large; but there was no motion for a new trial, on the ground of excessive damages. Besides, the record does not show that the judgment is too large.

The judgment is affirmed, with five per cent. damages and costs.

Davis, Wright, and Green, for the appellants.

T. W. Woollen, for the appellees.

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DUNCAN and Others v. THE BOARD OF COMMISSIONERS OF
MIAMI COUNTY and Others.

In an action for work and labor done, and materials furnished, in the erection of a building, under a written contract, in which it is expressly agreed that no allowance shall be made for *extra work*, in order to entitle the plaintiff to recover for extra work, the pleadings should show that the extra work claimed for was expressly authorized by the owner of the building, or that it was so distinct from the building contracted for that the owner might have accepted and used the building without accepting and using the extra work, and that such owner yet did accept and use such extra work.

APPEAL from the *Cass* Circuit Court.

PERKINS, J.—This suit was removed from the *Miami* to the *Cass* Circuit Court. It was instituted by the assignees of *Nathan Crawford*, to recover the sum of fifty-two thousand dollars, claimed to be due said *Crawford*, from *Miami* county, "for work done and materials furnished, by said

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Nathan Crawford, in the erection and completion of a new court-house, on the Public or Court-house Square, in the town of *Peru, Miami county, Indiana.*" So says the complaint. No written contract was set out.

The defendant answered, that the court-house was built under a special contract in writing, which writing was made a part of the answer, and which described the house to be erected, the price to be paid for its erection, including the furnishing of the materials, etc., and which written contract contained this stipulation, viz.: "And he (said *Crawford*) shall not be entitled to receive any additional compensation for any *extra* work done thereon, unless said *Board of Commissioners* shall, by their contract in writing, agree to pay the same." And the answer further averred payment of the entire sum required by the contract, for the completion of the house.

The plaintiffs replied: 1. The general denial unverified. 2. That twenty thousand dollars of the fifty-two thousand dollars were for *extra* work, which had been "accepted, used, and approved by the defendants."

A demurrer was sustained to the second paragraph of this reply; and, says the record, the plaintiffs refusing to plead further, it is considered that the defendants go hence, etc., and recover, etc. No exception was taken to the rendition of final judgment, nor did the plaintiffs ask for a trial of the cause. The demurrer to the reply was rightly sustained.

The case stands thus: The plaintiffs sue for the price of a court-house—fifty-two thousand dollars. The defendant answers, that the price of the court-house was fixed in a written agreement between the parties, at twenty-nine thousand six hundred dollars, and that that sum has been paid in full. The agreement is produced and shows that twenty-nine thousand six hundred dollars was the agreed price; and shows, further, that no claim, under it, for extra work

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would be allowed. Now, to avoid that answer, the plaintiffs should show that the extra work claimed for was expressly authorized by the *Board of Commissioners*, or that it was so distinct from the building contracted for, that the *Commissioners* might have accepted and used the building contracted for, without accepting and using the extra work.

Extra work could have been done under a new contract, perhaps a verbal one, and the county been liable for it. So, an additional separate structure might have been erected without a special contract, and, perhaps, been so accepted and used by the county as to render her liable to pay for it. See *McClure v. Secrest*, 5 Ind. 31. But the contractor could not, without the consent of the *Board*, put extra expense, in the way of finer finish, or more costly materials, and then claim pay for them, because the county used them. If this could be done, then every mechanic who contracts to build a residence for a person upon his own ground, in a given manner, and for a given price, could, by extra fine plastering, painting, carving, etc., double the expense of the house, without the consent of the owner, and compel him to pay the bill or abandon the whole house. This is not reasonable, and is not law.

The reply, in this case, sets up no new contract, nor does it show that the *extra work* was such as could have been rejected, without interfering with the use and enjoyment of the building as contracted for.

But, notwithstanding the special paragraph of the reply in avoidance of the answer was bad, the paragraph in general denial was good as a denial of the allegation of payment it contained; and requires, according to technical rules, a trial of that issue. It is, however, evident, that the party did not rely on the general denial, and that the Court so understood it, and, hence, rendered final judgment; the plaintiffs, as we have said, making no objection. Further, the record shows, by two exhibits, that the county has paid

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and become liable for, more than the contract price of the court-house.

Per Curiam.—The judgment is affirmed, with costs.

S. Major, for the appellants.

N. O. Ross and R. P. Effinger, for the appellees.

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PIERCE v. CUBBERLY and Another.

Where a party to an action is called as a witness for his adversary, appears, and submits to a partial examination, and then absents himself from the court-house, and disobeys legal process requiring his further attendance, such misconduct can not be considered in this Court, unless it was properly brought to the attention of the Court below.

APPEAL from the *Grant* Circuit Court.

DAVISON, J.—The facts alleged in the complaint are, substantially, as follows: *Pierce*, who was the plaintiff, and *Cubberly*, were partners in a contract with the *Marion and Logansport Railroad Company*, whereby they agreed to grade and construct said railroad from *Marion*, in *Grant* county, to *Logansport*, in *Cass* county, for which they were to be paid, by the company, twenty thousand dollars per mile. The company having failed to comply with the contract, and the work having been suspended, *Cubberly* assigned his interest in the contract and partnership effects to *Pierce*, who was to close up the partnership business, pay the debts of the firm with any means it might have, and should there be a balance, after payment of said debts, and paying him, *Pierce*, a reasonable compensation for settling up the concern, such balance was to be equally divided between them. Plaintiff avers that he paid the debts of the firm, which amounted to ten thousand dollars, but of that amount he

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paid, out of his own money and means, five thousand dollars, the latter amount being due, over and above the amount realized out of the property and assets of the firm. The object of the suit was for an account, etc.; also, for the recovery, against *Cubberly*, of one half of the sum paid by plaintiff out of his own means, and to subject to the payment thereof a certain tract of land which had been purchased by *Cubberly* with the property and moneys of the partnership, and the deed therefor taken in his wife's name, etc. Defendants answered by a general denial, and by two special defenses, wherein it is alleged, *inter alia*, that the plaintiff had received into his hands property and assets belonging to the firm of the value of eight thousand dollars, which he has converted to his own use, and which, after paying the partnership debts, and the plaintiff a reasonable compensation for settling up its affairs, would leave a balance of two thousand dollars. For the one-half of that balance, the defendants claim judgment, etc.

There was a reply in denial of the answer. Verdict in favor of the defendants, for four hundred and fifty-four dollars. Plaintiff moved for a new trial. Pending that motion, the defendants, at the suggestion of the Court, entered, upon the verdict, a *remititur* of three hundred and forty-seven dollars, and the Court, thereupon, overruled the plaintiff's motion, and gave judgment against him for one hundred and seven dollars.

The causes for a new trial, relied on in the appellant's brief, are thus assigned: 1. Misconduct of *William Cubberly*, one of the defendants, upon the trial. 2. The refusal of the Court to allow the plaintiff to prove the value of his services in settling up the partnership business. 3. The verdict is not sustained by the evidence. In support of the first assigned cause, it was shown, by the affidavit of the plaintiff, that, during the trial, the defendant, being present in Court, was called and sworn as a witness on behalf of the plaintiff,

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and having, as such witness, taken the stand, the plaintiff proceeded to examine him, but had not, at the adjournment of the Court in the evening, completed such examination. On the next morning, being the morning of the day on which the trial closed, the defendant failed to appear in Court, having absented himself for the purpose of avoiding his further examination, and the plaintiff, thereupon, procured a subpoena, to testify in the cause, to be served upon him, but he refused to obey it, and the trial proceeded to its close without his further testimony.

The statutory rule is, that "A party to an action may be examined as a witness, at the instance of the adverse party, and, for that purpose, may be compelled to testify in the same manner and subject to the same rules of examination as any other witness." "The attendance of the party to be examined may be enforced," and "any party refusing to attend and testify as above provided, may be punished as for a contempt, and his complaint, answer, or reply may be stricken out." 2 R. S., p. 96. These provisions very plainly point out the mode of proceeding against a party who, as a witness, refuses "to attend and testify." But, in this instance, the record fails to show that any proper step was taken to compel the attendance of the defendant. The plaintiff, it is true, caused the service of a subpoena; but the fact that its requirements were disobeyed, does not appear to have been presented, in any form, to the consideration of the Court, and the trial was allowed to proceed, in the absence of any effort to coerce his appearance, in the mode prescribed by the statute. The non-attendance of the defendant, as a witness, is not, therefore, an available ground for a new trial; but defendant, though his conduct as a witness may have been improper and illegal, has been guilty of no misconduct as a party to the suit, and hence, the first alleged cause for a new trial is unsustained.

The agreement between *Pierce* and *Cubberly*, referred to

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in the complaint, was given in evidence on the trial. By that agreement, *Cubberly* assigned all his interest in the property and effects of the partnership firm to *Pierce*, who thereby agreed to settle up and close the business of the firm, and pay all legal demands against it, and should there be a balance, after paying him a *reasonable compensation* for settling up said partnership, then such balance was to be equally divided between them. During the trial, the plaintiff offered to prove the value of his services in settling up and closing the business of the firm, but his offer was refused, and he excepted. This refusal, as we have seen, was one of the assigned causes for a new trial. We think the evidence should have been admitted, because it was pertinent to the issues. The plaintiff, in the event of there being a residue, after paying the debts of the firm, was entitled to pay for his services, and it was for the jury, in case they found such residue, to determine upon the amount of compensation to which he was entitled. For the error in refusing the offered evidence, the judgment must be reversed.

Per Curiam.—The judgment is reversed, with costs, and the cause remanded for another trial.

John Brownlee, for the appellant.

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BONDURANT *v.* BLADEN.

Action on a note against A, B, and C. Complaint in two paragraphs:

1. That, on the 1st of December, 1858, the defendants, by their note, promised one *H. E. Cowgill* to pay him two hundred and twenty-five dollars, six months after date, and that he indorsed the note to the plaintiff, which is unpaid.
2. That, on December 1st, 1858, A and B, two of the defendants, made a certain other note to *Cowgill*, whereby they promised to pay him the further

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sum of two hundred and twenty-five dollars, six months after date, and that, before the delivery of the note to *Cowgill*, and to induce him to accept the same, C, the other defendant, indorsed the note as an original promisor, whereby the defendants became liable, and promised to pay *Cowgill* said sum, etc., and that *Cowgill* indorsed the note to the plaintiff, and that it remains unpaid, etc. The note and indorsements read as follows:

“\$225.

GREENCASTLE, IND., December 1, 1858.

“Six months after date, we promise to pay *H. E. Cowgill*, or order, two hundred and twenty-five dollars, value received. A. B.”

Indorsed: “C.”

Indorsed further: “I guarantee the payment of one hundred and eighty-nine dollars and eighteen cents, when this note becomes due, to *Ed. G. Bladen*, and I assign the same to him. H. E. COWGILL.”

Held, that the complaint states a good cause of action against the defendants.

Held, also, that there is no defect of parties defendant, because *Cowgill's* indorsement guarantees the payment of a part of the note, and assigns it all.

Held, also, that although the first count, as applied to the note in suit, may be defective, yet a demurrer to the whole complaint must be overruled, as the second count is unobjectionable.

Answers: 1. General denial. 2. Fraud. 3. Want of consideration. 4. By C, one of the defendants, that he signed the note as a guarantor, and not as a maker, and that there was no consideration for his guaranty and indorsement. Fourth paragraph stricken out, on plaintiff's motion. Exception.

Held, that, as the complaint averred that C executed the note as a maker, he could make the same proof under the general denial that he could under the fourth paragraph, and it was, therefore, properly stricken out.

Held, also, that it may be legally inferred, from the pleadings, that the guaranty and the note were executed at the same time, and upon the same consideration, and, therefore, that C could make the same defense under the third paragraph of the answer as under the fourth.

Held, also, that the fact that the purpose for which the note in question was executed, and to which it was applied, operated as a

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benefit to A, one of the makers, was a sufficient consideration for its execution.

APPEAL from the *Putnam* Common Pleas.

DAVISON, J.—*Edward G. Bladen* brought this action against *Ruel Dobbins*, *William W. Allen*, and *Gabriel Bondurant*, upon a promissory note.

The complaint consists of two counts. 1. That, on the 1st of December, 1858, the defendants, by their note, promised one *Henry E. Cowgill* to pay him six months after date, two hundred and twenty-five dollars, and that *Cowgill* indorsed the note to the plaintiff, and the same is due, and remains unpaid, etc. 2. That, on the said 1st of December, *Dobbins* and *Bondurant*, two of the defendants, made a certain other note to *Cowgill*, whereby they promised to pay him the further sum of two hundred and twenty-five dollars, six months after date, and that, before the delivery of the note to *Cowgill*, and to induce him to accept the same, *William W. Allen*, the other defendant, indorsed the note as an original promisor, whereby the defendants became liable, and promised to pay *Cowgill* said last-mentioned sum, etc., and that he, *Cowgill*, indorsed the note to the plaintiff; but the same is due, and unpaid, etc., wherefore, etc. The note filed with the complaint, and the indorsements thereon, are as follows:

“\$225.

GREENCASTLE, Ind., December 1, 1858.

“Six months after date, we promise to pay *Henry E. Cowgill*, or order, two hundred and twenty-five dollars, value received.

“RUEL DOBBINS.

“GABRIEL BONDURANT.”

Indorsed, “WILLIAM W. ALLEN.”

Also indorsed, “I guarantee the payment of one hundred and eighty-nine dollars and eighteen cents, when this note becomes due, to *Ed. G. Bladen*, and I assign the same to him.

HENRY E. COWGILL.”

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Defendants demurred to the complaint on four grounds: 1. It does not state facts sufficient to constitute a cause of action. 2. There is a defect of parties defendants; that *Cowgill* ought to be made a party to answer to his interest in the note, the same being only partially assigned to the plaintiff. 3. The first count states no cause of action against *Allen*, he not having signed the note jointly with *Dobbins* and *Bondurant*. 4. The note was not assignable in parts. None of these grounds are available. As we construe the indorsement of the payee, it guarantees the payment of a part of the note, at its maturity, and then assigns the entire amount, stated on the face of it, to the plaintiff. And though the first count may be defective, when applied to the note in suit, still the demurrer addresses itself to the whole complaint, and in that case, if there be one good count, it should be overruled. The second count is unobjectionable. Defendants answered: 1. By a general traverse. 2. The note was obtained by fraud. 3. It was without consideration. 4. *Allen*, one of the defendants, for separate answer, says: "That he signed the note as a guarantor, and not as an original promisor, and that there was no consideration for said guaranty and indorsement." Plaintiff, at the proper time, moved to strike out the fourth paragraph of the answer. The Court sustained the motion, and the defendants excepted. This exception is not well taken. The complaint avers, that *Allen* indorsed the note as an "original promisor." That fact the plaintiff, to sustain his case, was, in the first instance, bound to prove; hence, it was competent for the defendant, by way of rebutting such evidence as the plaintiff might introduce to prove that averment, to show the character in which he made the indorsement. And if, as must be presumed from the averment in the paragraph, the note and guaranty were executed at the same time, we must intend that both were given upon the same consideration; and that being the case,

Bondurant & Bladen.

the third paragraph, which the defendants jointly plead, and which goes to the entire consideration of the note, afforded the guarantor all the defense he could have had under the fourth paragraph, had it not been stricken out. The decision of the Court did not, therefore, injure the defendant, and hence he can not be allowed to complain. Story on Prom. Notes, sec. 457. 6 Ind. 487.

There were replies in denial of the second and third paragraphs of the answer. Verdict for the plaintiff. New trial refused, and judgment.

Upon the trial *Henry E. Cowgill*, the payee of the note, was introduced as a witness, and testified, substantially, as follows: "When the note was delivered to me, the names of *Ruel Dobbins* and *Gabriel Bondurant* were signed to it, and the name of *William W. Allen* was indorsed on the back of it. Neither *Dobbins*, *Bondurant*, nor *Allen* was indebted to me, and no consideration passed between me and them, or either of them, other than this: I was security for *Dobbins* to the plaintiff, but I had not paid the security debt; the same was due, and I was liable for it, and expected to have to pay it. The note sued on was by me indorsed and delivered to the plaintiff in discharge, to the amount thereof, of said debt, and the plaintiff received the note in payment, to the amount of it, of such security debt. The amount of that debt was over five hundred dollars. The purpose for which the note was executed was to transfer and assign the same to the plaintiff, in part payment of the debt for which I was security. I was not present when either *Allen* or *Bondurant* signed the note, nor was either of them present when the note was delivered to me. The next day after it was delivered to me, I assigned it to the plaintiff."

In view of this evidence, it is insisted that the note sued on is without consideration. We think otherwise. The purpose for which it was executed, and to which it was applied, operated as a benefit to *Dobbins*, in payment of his

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debt, and that alone was a sufficient consideration for its execution. But the whole transaction plainly shows that the note was executed for the accommodation of *Dobbins* and *Cowgill*, and was, in accordance with the purpose for which it was made, transferred to the plaintiff for value. This being the case, it seems to us that the note is valid in the hands of the indorsee, though no consideration may have passed between the payee and the makers. Story on Prom. Notes, sec. 194. Chitty on Bills, 12th Am. ed., p. 96.

Per Curiam.—The judgment is affirmed, with two per cent. damages and costs.

Williamson and Daggy, for the appellants.

R. L. Hathaway, for the appellee.

DYNES v. SHAFFER and Others.

If a person desires to avoid a subscription to the capital stock of a railroad company, on the ground of fraudulent representations made by the soliciting agent of the company, to induce him to subscribe, and he suffers an unreasonable period of time to elapse before he asserts his right to such relief, [seven years in this case,] he should show a sufficient excuse for his failure to act at an earlier date, or the legal presumption will be against his right to set up said defense at all.

APPEAL from the *Delaware* Circuit Court.

HANNA, J.—Suit to recover forty-five acres of land, by *Dynes*, the remote vendee of the *Cincinnati, Newcastle, and Michigan Railroad Company*, against *Shaffer*, the vendor of said company. The pleadings are spun out to an unreasonable volume, being, together with the exhibits and orders thereon, some ninety pages of record. The prolixity and multifariousness is carried to such an unwarrantable extent,

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that we do not feel it our duty to search out the various minute points, half smothered in sounding repetitions, but shall direct our attention to the points which, to us, appear substantial.

1. The land was transferred to the company upon the solicitation of said *Dynes*, as agent thereof, for twenty shares of the capital stock thereof, the vendor remaining in possession. It was afterward transferred to one *Lupton*, and by him to the plaintiff.

The first question is: Whether certain representations, alleged to have been made by said *Dynes*, were sufficient to avoid said subscription of stock, etc., for fraud?

These representations were, that a sufficient amount was subscribed, and ample means possessed, to build the road; that it would be built in two years; that certain influential persons of said county, naming them, had subscribed large, designated, amounts; that said representations were fraudulent and false, and known to be so by the said *Dynes*; that *Shaffer*, believing and relying upon said representations, transferred, etc., and received a certificate of stock, etc., for one thousand dollars; but that the same is wholly worthless. Then follow averments, in an affirmative form, showing the falsity of the several representations, and that the road was not completed in two years, but the project of building the same had been, etc., wholly abandoned by the company, of all which plaintiff had notice.

A demurrer was overruled to this answer. Several objections are made to this ruling: 1. The stock certificate was not returned, nor offer made to that effect. 2. Too great a length of time had been suffered to elapse — some seven years. 3. It is not averred that *Dynes* had any authority to make the representations, etc. 4. The representations are not sufficient, etc.

2. It has been held, that the general and false representations of a solicitor of stock as to the means of the company and

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the time within which the road would be completed, are not sufficient to avoid a subscription of stock, etc. *Andrews v. Ohio, etc.*, 14 Ind. 169. *Hardy v. Merriweather*, *Id.* 205. Whether the representations as to persons, etc., who may have subscribed, was sufficient to have the effect to avoid, etc., we shall not pause to inquire; nor as to the power of the solicitor of stock to bind the company without any special authority to that effect, for the reason that the answer is bad for not showing at what time the fraud, if it was such, which had been perpetrated upon him, was discovered by the defendant? As something near seven years had intervened between the point of time when the land was transferred and that at which the suit was instituted, and during which no steps, so far as the record shows, were taken by the defendant to set aside the conveyance, and no excuse shown for such delay, we are of opinion the presumption would then be against his right to set up said facts, unless some excuse could be shown for the failure to act at an earlier date. *Barton v. Simmons*, 14 Ind. 49.

Another paragraph of the answer was similar to the one above noticed, except that it averred that several leading and influential persons, naming them, had fraudulently and corruptly combined, etc., with some of the officers and agents of said company, and agreed that they would, on a separate paper, pretend to subscribe, etc., but that the same should not be entered on the stock book, nor bind them, but that it should be proclaimed and given out to the public that they had each subscribed from two to ten thousand dollars, etc., so as, thereby, to deceive the ignorant and unwary into the belief that said road would be built, and induce such persons to subscribe; that defendant, believing and relying, etc., did subscribe. Averments of the falsehood of, etc.

Demurrer overruled. The same objections are urged to this as to the preceding; and, also, that such an agreement

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as that averred to have been made would have been binding upon the persons named.

The reasons which induce us to hold the former paragraph bad, are as cogent in forcing a conclusion in reference to this.

Another paragraph set up, in addition, that on the 12th of April, 1853, said railroad company was organized under the general railroad law; that on the 6th day of October, 1853, *Shaffer* conveyed said land to said company, and received said certificate of stock; that instead of completing said road, said company made a compact, etc., with the *Richmond, Newcastle, and Logansport Railroad Company*, whereby they were consolidated, etc., into one company, by the name of the *Cincinnati and Chicago Railroad Company*, without the consent of defendant, and said certificate of stock rendered wholly worthless, etc.

Demurrer overruled.

The same objections are urged to this that are to the first, and also, that by the act of February 28, 1853, authority to consolidate was conferred upon the said company, and if not by that act alone, that certainly said act, and the explanatory one of March 4, 1853, conferred that power. Acts 1853, pp. 105 and 107. Taking the two acts together, we are of opinion that, under the circumstances set forth, the authority to consolidate existed, and the defendant can not complain of its exercise. *Sedg. on Const. and Stat. Law*, p. 252. *Noble et al. v. Enos et al.*, at this term.

As the answers were thus insufficient, we have not examined the questions on the replies.

Per Curiam.—The judgment is reversed, with costs. Cause remanded for further proceedings.

Walter March, for the appellant.

David Nation and Clark M. Anthony, for the appellees.

Wonderly *v.* Booth and Others.

WONDERLY *v.* BOOTH and Others.

In the absence of fraud, if parties have a joint interest, the admissions of one will, in general, bind all; but proof that A agreed to keep B in stock as a blacksmith, and that A admitted that he was liable for goods got by B after a certain date, is not sufficient to establish such a unity of interest between A and B as to render this rule applicable.

APPEAL from the *Decatur* Circuit Court.

HANNA, J.—*Booth & Co.* sued *Wonderly and Smith*, on an account assigned to them by *Howard & Howard*. Answer: Denial and payment. Reply: Denial. Trial. Judgment against *Wonderly and Smith*, for eighty-six dollars, and against *Smith* for, etc.

It was shown, in proof, that while *Smith* was dealing with the *Howards*, *Wonderly* notified them that he would see them paid, etc.

The whole account, as is shown, was presented to *Smith*, and its correctness admitted by him. With the exception of a few items of small amount, this was all the evidence as to the sale or value of the goods, which consisted of many items.

One witness testified, that he "prepared a contract between *Smith* and *Wonderly*, by which *Wonderly* agreed to keep *Smith* in stock as a blacksmith." There were also, in evidence, the admissions of *Wonderly*, that he was liable for the goods got by *Smith* after a certain date, if he got any. *Wonderly* was a witness, and was not asked as to whether there was a partnership. One of the *Howards* was a witness, but said nothing as to the fact of the goods having been sold, or their value.

There was no other evidence showing a unity of, or joint interest between, *Smith* and *Wonderly*. Was there enough

Polk v. The State.

shown on that point to authorize the reception of the admissions of *Smith* as evidence against *Wonderly*?

Although it is held that, in the absence of fraud, if parties have a joint interest, an admission made by one will, in general, bind all (1 Gr. Ev., sec. 174); yet we can not perceive the applicability of this principle to the facts proved. The proof of the fact, that the defendant, *Wonderly*, was to keep his co-defendant in stock, is readily reconcilable with terms of a contract other than a partnership. Story on Part., sec. 43. What the terms of the contract were is not disclosed. If there was not a joint interest, the credit should have been given to *Wonderly* alone, to have made him liable, unless he was liable in the character of a guarantor.

Per Curiam.—The judgment is reversed, with costs. Cause remanded for another trial.

Oscar B. Hord and *Cortez Ewing*, for the appellants.

Samuel Bryan, for the appellees.

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POLK v. THE STATE.

In a prosecution for murder, if the jury, upon the whole evidence in the cause, have a reasonable doubt whether the defendant was sane when he committed the homicide, they must also, and for that reason, have a reasonable doubt whether he purposely and maliciously committed the crime, because, without sanity, the crime, as defined by the statute, can not be committed. *Hanna*, J., dissenting.

APPEAL from the Tippecanoe Circuit Court.

PERKINS, J.—*James Polk* was indicted for the murder of *John Stewart*, convicted of murder in the second degree, and sentenced, for twenty years, to the state prison. On the trial the Court charged the jury as follows:

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"Insanity is insisted upon, as a defense in this cause. Where the mental faculties are so deranged as to render the party incapable of distinguishing between right and wrong, the law will not hold him criminally liable for his acts while in such state. This, however, is a defense which must be made out by the defendant, and must be proved to your satisfaction by a preponderance of evidence."

The case turns, in this Court, upon the correctness of the above charge.

Crimes, *malum in se*, consist in acts done, and intentions with which they are done. *Dennison v. The State*, 13 Ind. 510. *Keely v. The State*, 14 *Id.* 36. Murder, in the second degree, consists: 1. In the act of killing a human being. 2. In purpose (intention) and malice in the killing. These two facts must exist to constitute the crime; and, in a given case, if there is a reasonable doubt of the existence of either fact, the defendant must be acquitted; but as purpose, intention, malice, are mental, are states of an intelligent mind, they can not, either of them, exist where the mind is deranged, is unsound, in the technical sense of the word, in short, is insane. Hence, the definition of murder, always and everywhere, has been the killing of a human being by a person of sound mind, etc.

The same rule of law applies as to both these facts; that is, that the jury must be satisfied of their existence beyond a reasonable doubt.

If, therefore, upon the whole evidence in the cause, the jury have a reasonable doubt whether the accused, upon trial, was sane when he committed the homicide or act charged against him, they must have a reasonable doubt whether he purposely and maliciously committed the act; and, hence, a reasonable doubt whether he committed the crime defined by statute.

The rule of proof, in these cases, is settled in this State. *Hale v. The State*, 8 Ind. 439. *French v. The State*, 12 *Id.*

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670. The rule in New York accords. *The People v. McCann*, 16 N. Y. Court of App. 58.

Per Curiam.—The judgment is reversed, with costs. Cause remanded for another trial.

HANNA, J.—Every man is presumed to be innocent (as to a crime charged) until the contrary is shown.

Every man is presumed to be sane until the contrary is shown.

To overcome this presumption of innocence, and to establish a charge of guilt, every material element necessary to constitute the crime must be proved beyond a reasonable doubt.

To make out a charge of even murder, no witness need say one word as to soundness of mind of the accused—that is presumed. If he is not of sound mind, that is a matter of defense. A plea to that effect might have been, under the English practice, interposed, as to unsoundness, at the time of the trial, and an issue found, a jury called, and that issue tried before the accused was placed upon his trial for the crime charged. Upon that issue it had to be clearly proved that the man was not of sound mind, before the presumption of sanity, like the presumption of innocence, could be overcome. Many authorities are to the effect that, where the defense is insanity at the commission of the act, the same weight of evidence is necessary to overcome either presumption; because one presumption is for the protection of the accused, the other for the protection of community, and the individual members thereof, from his acts.

These issues, under our practice, of guilt and of insanity at the time of the commission of the offense, being tried together, upon an accusation of crime, it appears to me, on a parity of reasoning, that the presumption of sanity can only be overcome by proof plainly showing insanity; that is, there must be, at least, a preponderance of evidence

Pate v. Shafer.

against his sanity, or the presumption and evidence of sanity will prevail. Even this does not require as rigid a rule of evidence, to protect community, as is required to guard the rights of the individual accused.

I therefore conclude that it does not, where such defense is interposed, require proof that will satisfy the jury, beyond a reasonable doubt, of the sanity of the accused; but if the evidence preponderates in that direction, it is, together with the presumption, sufficient.

John M. La Rue and R. C. Gregory, for the appellant.

John L. Miller, Pros. Att'y., and *Orth and Stein*, for the State.

PATE v. SHAFER.

In a complaint, the amount demanded in the prayer is the criterion of jurisdiction, and the same rule applies to a defense by way of set-off.

APPEAL from the *Ohio Common Pleas*.

Per Curiam.—This was an action by *Shafer* against *Pate*, commenced before a Justice of the Peace, upon an account, in which the plaintiff claimed a balance of sixty-two dollars and forty-six cents. The defendant filed an off-set of various items, amounting to five hundred dollars, but claimed judgment for the amount that might be found due him, after deducting what might be found due the plaintiff, "not to exceed one hundred dollars." On the appeal to the Common Pleas, the cause was tried, and resulted in a verdict and judgment for the plaintiff, for the amount of his claim.

The cause is before us on the evidence. The full amount of the plaintiff's claim being allowed him, it is apparent that the defendant's off-set was totally rejected. The evidence,

Cronkhite and Another v. White.

clearly enough, sustains some portion of the set-off; and, in reference to this portion, there does not appear to have been any conflict in the testimony. Hence, it seems to us, that a new trial, which was asked for, should have been granted. But it is insisted, by counsel for the appellee, that the set-off was beyond the jurisdiction of the justice, and, hence, that the verdict was right.

This point, in our opinion, is not well taken. In a complaint, the amount demanded in the conclusion is the criterion of jurisdiction. *Culley v. Laybrook*, 8 Ind. 285. *Guard v. Circle*, 16 Ind. 401. The same rule must apply in reference to a set-off. Here, the defendant claimed judgment for an amount "not to exceed one hundred dollars" which was within the jurisdiction of the justice.

This accords with the cases of *Alexander v. Peck*, 5 Blackf. 308, and *Gharkey v. Halstead*, 1 Ind. 389. *Murphy v. Evans*, 11 Ind. 517.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

A. C. Downey, for the appellant.

David McDonald, for the appellee.

CRONKHITE and Another v. WHITE.

APPEAL from the Warren Circuit Court.

Per Curiam.—Action by *White* against the appellants, to recover the value of one hundred bushels of corn.

Finding and judgment for the plaintiff.

The case is before us on the evidence, which is, in some respects, conflicting; but, taking the strongest view of it for the plaintiff, it fails to make out such a case as entitles him to recover.

Lange, Auditor of State, *v.* Stover.

The judgment below is reversed, with costs, and the cause remanded for another trial.

Joseph H. Brown and James Park, for the appellants.

Gregory and Hooper, for the appellee.

LANGE, Auditor of State *v.* STOVER.

The statutes on the subject of swamp lands (1 G. & H., p. 597, *et seq.*,) make full appropriation of the swamp land fund to the payment of legitimate claims against that fund, and no further appropriation is necessary to authorize the Auditor of State to draw his warrant, in a proper case, upon those funds.

APPEAL from the *Madison* Circuit Court.

Per Curiam.—Application by *Stover* against the *Auditor of State*, for a mandate to require him to issue warrant on the swamp land fund of *St. Joseph* county. Demurrer to complaint overruled, and judgment for the plaintiff.

Two points are made, in which it is supposed the complaint was defective. The first is, that it does not appear that there were funds in the State treasury belonging to *St. Joseph* county applicable to the payment of the claim. This is directly and sufficiently averred.

The second is, that there has been no appropriation of the swamp land funds sufficient to require the *Auditor of State* to draw a warrant upon those funds. The eighth section of the act of 1859 (Acts 1859, p. 230) provides that “The Auditor of State shall at no time draw a warrant upon the Treasurer of State, unless there be money in the treasury belonging to the fund upon which the same is drawn to pay the same, and in conformity to appropriations made by law, and on money actually in the treasury subject to the payment of the same,” etc. This provision undoubtedly

King and Another v. Stewart and Another.

prohibits the Auditor from drawing a warrant for the payment of money unless there has been an appropriation made by law of money for the payment of the claim.

But, we think, the statutes on the subject of swamp lands make an ample *appropriation* of the swamp land fund to the payment of legitimate claims against that fund. 1 G. & H., Stat., p. 597, *et seq.* These statutes not only make a sufficient appropriation of the funds to that purpose, but prohibit their diversion to any other. The Auditor is authorized to draw his warrant, in a proper case, upon these funds, and no other or further appropriation is necessary than is found in the statutes above referred to. It is not disputed that the claim in this case was a legitimate one against the fund in question.

The judgment below is affirmed, with costs.

W. A. Peelle, for the appellant.

J. E. McDonald and *A. L. Roache*, for the appellee.

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KING and Another v. STEWART and Another.

The reader is referred to the opinion, for the ruling in this case.

APPEAL from the *Decatur* Common Pleas.

WORDEN, J.—Action by *Stewart & Stewart* against *King & Braden*, upon a promissory note, made by the defendants to one *Hedrick*, and indorsed by the latter to the plaintiffs. Trial by the Court, finding and judgment for the plaintiffs.

The case is before us upon the evidence. The defense sought to be made available is a want of consideration for the note. It appears that, in February, 1861, said *Hedrick* and the defendants entered into a contract by which *Hedrick* was to deliver to the defendants a certain number of

King and Another v. Stewart and Another.

hogs, at a time named, for which the defendants were to pay a stipulated price, and the defendants then paid *Hedrick*, on the contract, two hundred and eighty-one dollars. Before the time for the delivery of the hogs arrived, *Hedrick* procured the defendants to enter themselves as replevin bail upon some judgments rendered against him before a Justice of the Peace, and it was agreed that the defendants should assume the payment of the judgment, and it should be deemed and taken as a payment on the hog contract. Afterward, and after the time for the stay of execution had expired, viz., on the 10th of August, 1861, the said *Hedrick* delivered the hogs, in pursuance of the contract, which amounted to three hundred and eighty-five dollars and seventeen cents, from which was deducted the payment of two hundred and eighty-one dollars, before mentioned, and the following due bill or note sued on was given for the balance, viz.:

“ Due *J. M. Hedrick*, one hundred and four dollars and seventeen cents, it being the balance due on hogs, this August 10th, 1861. J. G. KING and R. BRADEN.”

At the time of the above settlement, and the striking of the balance in favor of *Hedrick*, one of the defendants told *Hedrick* he knew where that money belonged. *Hedrick* said that he did; that it had to go on those Justice's judgments. But the parties could not go to the Justice's that evening, and *Hedrick* wanted a showing or due bill for the amount, until they could meet at the Justice's and ascertain the amount of the judgments, and make a settlement. The note was given, and the parties agreed to meet at the Justice's office in a few days, and see if the amount of the judgments equaled the amount of the note, and if so, the note was to be surrendered. The proposed meeting never was had. The judgment exceeded the amount of the note. On the 13th of August, 1861, the defendants were notified that the note had been assigned to the plaintiffs. Afterward,

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on the 16th of the same month, the defendants, as such replevin bail, as the receipt given therefor shows, paid off the judgments.

We are of opinion that the judgment below must be sustained. It was a question of fact for the Court below to determine, under the evidence, whether it was the intention of the defendants and *Hedrick*, by their agreement, that the assumption of the payment of the judgments by the defendants, and their entering themselves as replevin bail thereon, should, *ipso facto*, be taken and deemed a payment of the amount of the judgments on the hog contract, or whether actual payment of the judgments by the defendants was contemplated? The Court might, under the evidence, have found that the latter was the intention of the parties. If so, the amount of the judgments had not been *paid* upon the hog contract at the time the note was given, but the balance specified was due thereon, and furnished a good consideration for the note. The payment of the judgments was made after the defendants were notified of the indorsement of the note to the plaintiffs.

Per Curiam.—The judgment below is affirmed, with costs and one per cent. damages.

Oscar B. Hord and Cortez Ewing, for the appellants.

**MAFFETT v. POLLARD.**

Where time is given beyond the term to file a bill of exceptions, the record should show that the bill was filed within the prescribed time.

APPEAL from the *Morgan* Common Pleas.

DAVISON, J.—This was an action by the appellee, who was the plaintiff, against *Maffett*, upon an account for ninety-five

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dollars. The account, originally, was in favor of one *John Shiel*, who assigned it to the plaintiff. *Shiel* was made a defendant to answer as to the assignment, etc. The issues were submitted to the Court for trial. Finding for the plaintiff. New trial refused, and judgment.

The record shows that the cause was tried on the 19th of November, 1860, and that the Court, upon its refusal to grant a new trial, granted the defendant leave to file his bill of exceptions within thirty days. There are, in form, two bills of exceptions set out in the transcript, but the record fails to show when they were filed. In this instance, the leave evidently extended beyond the term, and that being the case, the record ought to show that the bills were filed within the prescribed time. *Simonton v. The Plank Road, etc.*, 12 Ind. 380. *Howard v. Burk*, 14 Id. 35. *Peck v. Van-kirk*, 15 Id. 159. These authorities are decisive that the bills of exceptions are no part of the record, and the result is, the rulings of the Common Pleas are not properly before us.

Per Curiam.—The judgment is affirmed, with five per cent. damages and costs.

Hester, Phelps, and Harrison, for the appellant.

C. C. Nave, for the appellee.

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WILSON v. THE STATE.**APPEAL** from the *Posey* Common Pleas.

Per Curiam.—The judgment in this case is reversed, and the clerk ordered to notify the keeper of the State prison to return the convict to the jail of *Posey* county. This case is decided on the authority of *Justice v. The State*, 17 Ind. 56.

A. J. Thornton, and McDonald and Roache, for the appellant.

Roberts *v.* The State.

SPRINGER *v.* THE STATE.

The record, in a criminal prosecution upon indictment, should show that the indictment was returned into Court by the grand jury, and identify it, by some entry from the record of the lower Court, describing it by the time of its filing and its number, or otherwise.

APPEAL from the *La Grange* Circuit Court.

Per Curiam.—In this case, the record of the Circuit Court does not show that the indictment on which the defendant was convicted was returned into Court by the grand jury. It shows that a grand jury was impaneled for the term, and that they found nine indictments; but has no entry describing them, or in any manner identifying them. On the return of the indictments, the clerk should enter that the grand jury return into Court the following bills of indictment, which are now marked, filed, and numbered 1, 2, 3, etc., or lettered A, B, C, etc. See 2 G. & H., p. 394, note.

Some entry, substantially in this form, would place upon record evidence connecting the grand jury with the indictment.

The judgment is reversed, and the defendant ordered back to the jail of *La Grange* county, all of which is to be certified to the keeper of the State prison.

A. Ellison, for the appellant.

ROBERTS *v.* THE STATE.

Where the jurisdiction of the Common Pleas to try for a felony is based upon the fact that the defendant is in custody, the information must show that the crime for which he is prosecuted is the same for which he is in custody.

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APPEAL from the *Marion* Common Pleas.

Per Curiam.—The judgment in this case is reversed, on the authority of *Justice v. The State*, (see 2 G. & H. 394, notes,) and the appellant ordered to be returned to the jail of *Marion* county, all of which is to be certified to the keeper of the State prison.

A. J. Thornton, and McDonald, Roache, and Lewis, for the appellant.

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APPEAL from the *Dearborn* Common Pleas.

Per Curiam.—The judgment in this case is reversed, on the authority of *Justice v. The State*, (see 2 G. & H. 394, notes,) and the appellant is ordered to be returned to the jail of *Dearborn* county, all of which is to be certified to the keeper of the State prison.

McDonald, Roache, and Lewis, for the appellant.

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The words, "If any person shall disturb any religious society, or any member thereof, when met or meeting together for public worship," shall be fined, etc., in section 37, of the Act defining Misdemeanors, etc., are void for uncertainty, so far as they attempt to create and define a crime or misdemeanor.

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APPEAL from the *Fountain* Common Pleas.

PERKINS, J.—*Jesse Marvin* was prosecuted in the *Fountain* Common Pleas, for disturbing a religious meeting by responding to the preacher. He was convicted and fined.

We have a statute which enacts, that if any person shall

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keep a place for the sale of any article; or shall sell any article; or shall keep any gaming apparatus; or shall permit his real property to be occupied for any of the aforementioned purposes, or with the aforementioned apparatus, within a mile of any meeting, assembled for, etc., or shall disturb any such meeting, or any member thereof, either at the meeting, or while going to or returning from the same, etc., shall be fined not less than five nor more than twenty-five dollars. 2 G. & H., p. 469.

The defendant in this case, as appears, was not prosecuted for any one of the acts specified in the statute as constituting a crime, as entering into its definitions, but under the general clause, for disturbing a religious meeting; a clause which defines nothing, but enacts a vague conclusion, an abstract, general proposition, of infinitely uncertain application. And the question is: Can the conviction, upon that branch of the statute, be sustained?

Before proceeding to answer this question, we may, with propriety, look a moment or two at some heretofore, in this country, generally conceded views and propositions:

1. There are two general modes of government, viz., by rule, or established laws, and without rule, without regard to law, that is, by magisterial discretion.

In theory, a political organization, governed by magisterial discretion, is an unmitigated despotism; and, according to history, it has generally turned out to be so in practice. In past years, the *Sultan of Turkey*, the *Autocrat of Russia*, and some of the kings and emperors of ancient *Rome*, governed by magisterial discretion. The *Tudors* and *Stuarts* of *England* attempted the same kind of government. Government by such discretion, is the government of a master over a slave.

2. The devising of proper and efficient checks upon governmental discretion, whereby lawless outrage upon the citizen may be prevented, is one of the greatest achievements

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in political science. Among the checks already devised for such purpose, are the division of a single government into departments, and the framing, with precision and certainty of expression and definition, of written constitutions and laws, declaring the rights, duties, and liabilities of all, and controlling the action, and limiting the powers, alike of the governors and the governed.

3. Magisterial discretion, in declaring and punishing crimes, is, perhaps, more liable to abuse, and to be made the instrument of tyranny and oppression, than it is in any other branch of administration. Hence the necessity of the most efficient checks, and their most scrupulous observance in this branch. Influenced, we may presume, by these considerations, it has been made established law, that there are no common law crimes in this State; that, in *Indiana*, "Crimes and misdemeanors shall be defined, and punishment therefor fixed by the statutes of this State, and not otherwise." 1 G. & H., p. 416, and notes.

This may be an injudicious application of the doctrine of limiting discretion; it may be carrying it to extreme. It not only cuts off magisterial, executive discretion in declaring crimes, which is certainly right, but, also judicial, which may be wrong, and is surely inconvenient, when applied to every possible case. The legislature can scarcely foresee every state of facts, can scarcely anticipate every possible act, and, hence, can scarcely prescribe specially for every individual case; while, on the other hand, the judiciary acts generally upon individual cases as they occur, and is thus enabled, by a careful and wise discrimination, to gradually build up a criminal code, within limits prescribed by the legislature, more just and certain in character than might otherwise be obtained. At the same time, it must be accomplished through the judiciary, by open, speedy public trials, with the aid of counsel and jury, whereby tyranny and abuse will be pretty effectually checked.

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It might be better to leave the power in the Courts of defining, upon given states of fact, or going to the common law for definitions, in cases of necessity, as was formerly the practice in this State. See 1 Kent Com., Lecture 16. But we have not to decide upon what the law might be, but what it is. It is, that the legislature alone can define a crime in *Indiana*. No crime, then, can be punished, in *Indiana*, by her own Courts, till it has been defined. No power can define a crime but the legislative; hence, the Court can not do it here, as it can in *England*, in case of misdemeanors. The question in this case is, then: Has the legislature defined the crime of disturbing a meeting? If so, what is the definition? Where is it to be found? What must a person do to, in legal meaning, disturb a meeting, or a member thereof? Will a look disturb? Will a smile? Will a word spoken? Will a posture, or style of dress disturb? If so, what? Who can give an exact answer? And, is intention with which an act is done to be material? Naming a crime is not defining it; but a definition is an enumeration of the particular acts included by or under the name.

That part of the section of the statute, then, which simply declares that it is a crime to disturb a meeting, only names, without defining, a crime; and the Court can not define it without exercising magisterial discretion; and judge-made law, in this case, would, perhaps, be the law of a tyrant. See *Spencer v. The State*, 5 Ind., p. 46.

The decision we here make but follows those in *Hackney v. The State*, 8 Ind. 494, and *Jennings v. The State*, and *The State v. Huey*, 16 *Id.*, pp. 335, 338.

Per Curiam.—The judgment is reversed. Cause remanded to be dismissed.

M. M. Millford, for the appellant.

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A commissioner, acting under a reference to him of matters in issue in a pending suit, has no right to report the evidence given before him, though he may report the facts proved by it, if authorized to do so by the parties.

The failure to demur to the complaint, or move in arrest, as a general rule, is a waiver of objections thereto.

But the failure of the complaint to state facts sufficient to constitute a cause of action, may be urged as a ground of reversal in the Supreme Court, although the objection was not made below.

Unless there has been a verdict, or finding in the nature of a verdict, in which case all defects in the complaint will be cured thereby, if, from the issues in the case, the facts omitted, or defectively stated, may fairly be presumed to have been proved on the trial.

An administrator, having advanced his own funds in payment of the demands against his intestate's estate, thereby acquires no right of action for money thus voluntarily advanced, against the heirs of the estate.

APPEAL from the *Knox* Common Pleas.

DAVISON, J.—The appellees, who were the plaintiffs, sued the appellants, alleging, in their complaint, that in the year 1845, *John McCord*, then in life, but now deceased, was the administrator of *John F. Snapp*, deceased, and, as such administrator, expended a large sum of money in the administration of the intestate's estate, over and above the amount that came into his hands as administrator of that estate, to-wit: the sum of one hundred and sixty-two dollars and eighty cents; that both parties, plaintiffs and defendants, are the heirs of *John McCord*, deceased, made so by his last will, whereby he bequeathed to the plaintiffs one-third of all his personal estate, and also one-third of the amount so expended by him as aforesaid; and to the defendants and *John F. Snapp, Jr.*, one-third thereof; that afterward, in the year 1852, *John F. Snapp, Jr.* died, leaving his mother, the

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said *Jane Simpson*, and his brother and sister, the said *Abraham F. Snapp* and *Eliza McClure*, his heirs at law; that at the death of *John F. Snapp, Jr.*, one-half of his estate descended to *Jane Simpson*, his mother, and one-fourth each, to *Abraham F. Snapp* and *Eliza McClure*, his brother and sister; that one-third of said one hundred and sixty-two dollars and eighty cents belongs to each of them, as follows: five thirty-sixths thereof belong to *Abraham F. and Eliza*, and one-eighteenth to *Jane Simpson*; that upon the death of the said *John F. Snapp, Sen.*, the defendants received a large amount of land and money, in all amounting to ten thousand dollars, from his estate, and thereby the defendants became liable to pay to the plaintiffs their portion of the amount, so as aforesaid paid out and expended by the said *McCord*, in his lifetime; wherefore, etc.

Defendants' answer consists of five paragraphs: 1. A general denial. 2. That said *John McCord*, formerly administrator of *John F. Snapp*, the father of the defendants, received large amounts of money, to-wit: eight hundred dollars, as such administrator, which he never accounted for; therefore, they say, they do not owe any part of the amount claimed, etc. 3. That the settlement of *McCord*, as administrator of the estate of *John F. Snapp*, deceased, in which he, as such administrator, was allowed one hundred and sixty-two dollars and eighty cents, was made in the *Knox* Probate Court, in the year 1845, was a last and final settlement by the administrator of said estate; that the defendants were, at that time, minors, and were not made parties to the settlement, nor did they appear at the same, either in person or by guardian; that they never knew or heard of such claim until this suit was instituted, and that five years have not elapsed since they arrived at full age: therefore, they say, they are not estopped by said settlement, and they pray that the same may be opened and set aside, or that proceedings in this suit be continued until

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they can have the settlement opened, etc. 4. That plaintiffs have received divers claims, to the amount of two hundred dollars, which should be credited on any claim which they have against the defendants. 5. That one-third of the claim sued on belongs to the defendants, as heirs-at-law of *John McCord*, deceased, etc.

Plaintiffs replied: 1. By a general traverse. 2. That *McCord* accounted for all the moneys that came into his hands as such administrator, etc.

Issues being thus made, the cause was referred to *William P. Hargrave*, a commissioner, who, at the December term, 1858, filed his report, with a statement of the evidence given before him. Under the issues and upon the evidence, the commissioner found, "That there was an allowance made to *John McCord*, administrator of the estate of *John F. Snapp*, deceased, by the Probate Court of *Knox* county, on the 22d of November, 1845, of one hundred and sixty-two dollars and eighty cents, the amount claimed in this suit, by the plaintiffs, as his heirs," and that the same has never been paid or released, but stands in full force; that that sum, with interest from the 22d of November, 1845, until the 22d of December, 1858, amounts to two hundred and ninety dollars and fifty-nine cents, of which the plaintiffs are each entitled to recover ninety-six dollars and eighty-six and one-third cents. The defendants, the report having been filed, excepted to the finding, on the ground that it was unsustained by the evidence, but the Court overruled the exception, and rendered judgment in favor of each plaintiff, in accordance with the finding, etc.

The errors assigned, so far as they are noticed in the appellant's brief, are thus stated: 1. The complaint contains no cause of action. 2. The evidence does not sustain the finding of the commissioner. There is nothing in the second assignment. A commissioner, "acting under a reference to him of matters in issue in a pending suit, has no

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right to report the evidence given before him, though he may report the facts proved by it, if authorized to do so by the parties." *Ware v. Adams*, 12 Ind. 359. And the result is, the evidence, so reported, is not properly before us, and, consequently, is not examinable in this Court.

In reference to the first assigned error it may be noted, that there was no demurrer to the complaint, or motion in arrest, and such being the case, the general rule is, that objections to the complaint are deemed waived. But there are exceptions to that rule, and one of them is where the pleading "does not state facts sufficient to constitute a cause of action." 2 R. S., G. & H., p. 81, sec. 54. That objection, though not made in the Court below, may be raised on appeal. 10 Ind. 117. 12 *Id.* 389. *Perkin's Practice*, p. 31.

The complaint is alleged to be defective: 1. Because it does not allege that defendants are the heirs of *John F. Snapp, Sen.*, deceased. 2. The purpose for which the administrator expended the one hundred and sixty-two dollars and eighty cents is not alleged. 3. The cause of action in this case, if there be any, is in the administrator of *John McCord*, deceased, and suit should have been instituted in the name of such administrator.

These objections appear in the complaint, and it is no doubt competent for the appellant to raise them in this Court. Still, the inquiry arises, as it would have arisen on motion in arrest in the lower Court, Whether they are not cured by the finding of the commissioner? Such finding is, in effect, a verdict. And it is well settled that "Defects in a complaint are cured by verdict, if, from the issues in the case, the facts omitted, or defectively stated, may fairly be presumed to have been proved on the trial." 1 Chitty's Pl. 12th Am. ed., p. 673, *et seq.* *Stanley v. Whipple*, 2 McLean, 35.

As we have seen, the first objection is, that the complaint "does not allege that defendants are the heirs of *John F. Snapp, Sen.*, deceased." It does, however, allege, "that

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they received a large amount of land and money, in all amounting to ten thousand dollars, from his estate, and thereby became liable to pay." This averment very plainly allows the inference that the defendants were the heirs of the decedent; and the commissioner having found them liable, as heirs, it must be presumed that the fact of their heirship was duly proved before him.

But the second and third objections must be held conclusive against the validity of the complaint. An administrator having advanced his own funds in payment of demands against the estate, acquires no right of action, for money thus voluntarily advanced, against the heirs of the intestate. *Egbert v. Rush*, 7 Ind. 706. At all events, the purpose for which the advance was made should be affirmatively alleged, in order that the Court may be enabled to determine, from the face of the complaint, whether it constitutes a sufficient cause of action. But the claim sued for, if valid, belonged to the estate of *John McCord*, deceased, as a part of its assets, and the administrator of that estate is, of course, entitled to it, in his fiduciary capacity; and the result is, it can not be collected by suit, otherwise than in his name. And if, as found by the commissioner, the one hundred and sixty-two dollars and eighty cents was allowed by the Probate Court, this suit for the recovery of that demand should have been founded on the allowance, and not upon a charge for money expended in the administration of the estate. The complaint being thus fatally defective, the judgment must be reversed.

Per Curiam.—The judgment is reversed, with costs. Cause remanded for further proceedings.

F. W. Vielle, for the appellants.

J. C. Denny, for the appellees.

Duck and Others *v.* Wilson and Another.

Duck and Others *v.* Wilson and Another.

A mortgagee, who has already recovered a personal judgment against the mortgagor, on the note secured by the mortgage, may afterward prosecute his suit for foreclosure upon the note and mortgage, and recover another personal judgment, in connection with his decree in foreclosure, against the mortgagor, the amount of which latter judgment may be measured by the note, or the former recovery upon it.

APPEAL from the *La Grange* Common Pleas.

DAVISON, J.—Wilson and Hayden brought an action against Duck to foreclose a mortgage on lot number five, in block number thirty-one, in the town of *La Grange*. The mortgage bears date, January 28, 1860, and was executed by the defendant to one *Richard S. Hubbard*, to secure the payment of a promissory note for three hundred and ninety-two dollars, which note is of even date with the mortgage, was payable to *Hubbard*, and by him assigned to the plaintiffs. It is averred, in the complaint, that the plaintiffs, at the December term, 1860, recovered a judgment, in the *La Grange* Common Pleas, against the defendant, *Duck*, upon said note, for four hundred and twelve dollars; that an execution was issued on said judgment, which was returned, by the sheriff, *Nulla bona*; that no proceedings are now being had on that judgment, or for the collection of the note, other than this suit, and that the note and judgment, both and each, remain unpaid. The relief sought is that the plaintiffs recover a judgment against the defendant, that the mortgage be foreclosed, etc., and that they have other relief, etc.

Defendant demurred to the complaint, but his demurrer was overruled, and, thereupon, he answered: 1. By a denial. 2. Payment. 3. That, on the 14th of December, 1860, the plaintiffs recovered a judgment against *Abraham M. Duck*, the present defendant, on said note, in the *La Grange* Com-

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mon Pleas, which judgment is in full force, and unreversed, etc. To this third paragraph the Court sustained a demurrer and the defendant excepted. The issues were then submitted to the Court, who found, for the plaintiffs, three hundred and eighty-six dollars and eighty-three cents, and having refused a new trial, rendered judgment that the plaintiffs recover of the defendant the amount so found, with cost, etc.; that the mortgaged premises be foreclosed, etc., and that the same be sold for the payment of the judgment, etc. At the proper time, the defendant moved to strike out the judgment against him, personally, but his motion was overruled, and he excepted.

The evidence is upon the record; it consists of the mortgage and note secured by it, and a record of the proceedings and judgment, on the note, in the *La Grange* Common Pleas as referred to in the complaint.

Against these rulings it is argued that the plaintiff, having sued on, and recovered a judgment upon the note secured by the mortgage, could not, afterward, in a suit to foreclose the mortgage, obtain another judgment against the defendant, upon the same note. This position, in its application to the case at bar, is not strictly correct. The plaintiff had a right to foreclose his mortgage, and in the proceeding for that purpose, it was proper, as has been done in this case, to allege, in the complaint, and prove, on the trial, the former recovery upon the note. For the demand thus alleged and proved, he was, plainly, entitled to a personal judgment against the defendant; and, it seems to us to be immaterial whether such judgment be measured by the note, or the former recovery upon it.

Per Curiam.—The judgment is affirmed, with three per cent. damages and costs.

Sutherland and Another v. The Lagro and Manchester Plank Road Company.

GORDON and Others v. THE SOUTHERN BANK OF KENTUCKY.

Accommodation indorsers of a promissory note governed by the law merchant, do not stand in the relation of sureties for the maker, for whose accommodation they became indorsers, within the meaning of our statute in relation to "Remedies of sureties against their principals."

APPEAL from the *Floyd* Circuit Court.

Per Curiam.—Accommodation indorsers of a promissory note governed by the law merchant, do not stand in the relation of sureties for the maker, for whose accommodation they became indorsers, within the meaning of our statute in relation to "Remedies of sureties against their principals."

2 R. S., 1852, p. 186.

The judgment below is affirmed, with costs.

Thomas L. Smith and *M. C. Kerr*, for the appellants.

Randall Crawford and *Henry Crawford*, for the appellee.

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SUTHERLAND and Another v. THE LAGRO AND MANCHESTER PLANK ROAD COMPANY and Another.

If a corporation had once a legal existence, which is alleged to have been determined, it is necessary that the pleading should show and set forth particularly the manner in which its corporate powers ceased.

If a complaint fail to state facts sufficient to entitle the plaintiff to the relief prayed for, he will not be entitled to an injunction, or temporary restraining order, and the dissolution of either will not be error.

APPEAL from the *Cass* Circuit Court.

Sutherland and Another v. The Lagro and Manchester Plank Road Company.

WORDEN, J.—Complaint by the appellants against the appellees, setting up, in substance, the following facts: That, in January, 1854, the above-named Plank Road Company recovered a judgment against the plaintiff, *Sutherland*, upon a stock subscription, for the sum of seventy-four dollars, upon which *Adams*, the other plaintiff, became replevin bail; that an execution upon the judgment was placed in the hands of *Eldridge*, the sheriff, who was about to levy upon property, etc.; that, at the time of the rendition of the judgment the Plank Road Company had an existence, but that, since the rendition thereof, "said Plank Road Company has ceased to keep up its organization, and now has no existence as a corporation, as said *Sutherland* verily believes;" that the corporation has never delivered or issued to *Sutherland* the stock for which the subscription was made, and has become incapable of doing so.

Prayer for a restraining order, etc., and that, on the final hearing, the defendants be perpetually enjoined from collecting the judgment.

On the complaint, the inference is that a restraining order or temporary injunction was granted; but that does not appear by the record. A motion was made by the defendant "to dissolve the injunction in this case," which motion was sustained, and the injunction dissolved, and from the order of the Court dissolving the injunction this appeal is taken. No answer or demurrer was filed to the complaint, or other steps taken in the cause.

It is insisted that the order of the Court, dissolving the injunction, was erroneous. We may observe that the ground upon which the injunction was dissolved does not appear in the record, and we are not prepared to say, as is contended by counsel for appellant, that such ground must so appear. If not, the presumption would be that there was sufficient ground, the contrary not appearing.

But we are of opinion that there was sufficient ground
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appearing on the face of the complaint. That, in our opinion, was radically defective, and did not show sufficient facts to entitle the plaintiffs to the relief sought, or to a temporary injunction until the final hearing. It is alleged, to be sure, that the corporation has no existence; that it has ceased to keep up its organization. This last allegation amounts to nothing more than that the corporation has ceased to continue its organized corporate existence. The corporation having once had a legal existence, it was necessary that the pleading should show and set forth particularly the manner in which the corporate powers ceased. *The Brookville, etc., Turnpike Company v. McCarty*, 8 Ind. 392. *Heaston v. The Cincinnati and Fort Wayne R. R. Co.*, 16 Id. 275. This is not done in the pleading before us.

Per Curiam.—The judgment below is affirmed, with costs.

Pratt and Baldwin, and Horace P. Biddle, for the appellants.

E. Walker, for the appellee.

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NEWKIRK and Another v. NEILD.

Where the holder of a note, which is past due, for a new and valuable consideration received by him, agrees to forbear to bring suit upon the note, for a reasonable time thereafter, and violates such agreement, such breach can not be made available by way of counterclaim.

APPEAL from the *Floyd* Common Pleas.

WORDEN, J..—Action by *Neild* against the appellants, upon a promissory note.

The defendants filed an answer of four paragraphs, to three of which a demurrer was sustained. Issue on the other paragraph; trial; finding and judgment for the plaintiff.

Newkirk and Another v. Neild.

The case comes before us on the ruling of the Court sustaining the demurrer to the three paragraphs of the answer. These paragraphs need not be here copied, as the questions presented by them are properly stated in the following excerpt from the brief of counsel for the appellants. "The questions intended to be raised by these pleadings are: Whether, after a note has become due, an agreement between the parties for a new and valuable consideration received by the payee, that the latter will forbear to bring suit upon it for a reasonable time thereafter, can be made available either as a plea in abatement or in bar, in an action upon the note, or by way of counterclaim?" The counsel for the appellants do not contend that the matter can be made available in abatement or bar. That it can not, would seem to be settled by the following cases in this Court. *Mendenhall v. Lenwell*, 5 Blackf. 125. *Clark v. Snelling*, 1 Ind. 382. *Thalman v. Barbour*, 5 Id. 178.

But, as is well remarked by counsel for the appellants, these decisions are not based upon the proposition that such an agreement is *invalid*, or that it is wholly *nugatory*, but upon the ground that it is an *independent contract*. Therefore, if broken, an action may be maintained upon it, although its breach is not an answer to a complaint upon the note. Hence, it is insisted, that inasmuch as a breach of the agreement furnishes a right of action, it can be made available as a defense, by way of counterclaim, to a suit upon the note.

But we are of opinion that such defense can not be made available by way of counterclaim. Admitting that such matter arises out of, or is connected with the cause of action, and might be the subject of an action in favor of the defendant, so as to come within the definition of a counterclaim, still there was no breach of contract, or such right of action, at the time of the commencement of the suit.

Where the bringing of an action is the breach of an

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agreement, but where such breach is no bar to the action, it seems to us that such breach is no defense by way of counterclaim, as no such defense existed at the time the suit was brought. But were this not so, there is another reason why the judgment in this case must be affirmed. The facts set up entitle the defendants, at most, to but nominal damages. The substantial damages for a breach of such an agreement would be the enforcement of collection before the stipulated time. The simple commencement of a suit would, to be sure, be a technical breach of the agreement not to sue; but until such suit was prosecuted to final judgment, the damages could be but nominal, and for nominal damages a judgment will not be reversed. *Tate v. Bove*, 9 Ind. 13.

The judgment below is affirmed, with costs, and one per cent. damages.

Thomas L. Smith and M. C. Kerr, for the appellants.
J. and A. B. Collins, for the appellee.

ARNOLD *v.* THE STATE.

APPEAL from the *La Grange* Common Pleas.

HUNTER *v.* THE STATE.

APPEAL from the *Warrick* Common Pleas.

APPLE *v.* THE STATE.

APPEAL from the *Marion* Common Pleas.

MAY *v.* THE STATE.

APPEAL from the *Cass* Common Pleas.

Tompkins and Others v. The Floyd Co. Agricultural, etc. Ass. and Another.

SMITH v. THE STATE.

APPEAL from the *Vanderburgh* Common Pleas.

Per Curiam.—The informations on which the foregoing causes are based, are all alike defective, because they fail to aver the facts which are necessary to give the Courts of Common Pleas jurisdiction to try them. The judgments and convictions therein must, therefore, be reversed, and the prisoners, respectively, returned to the counties whence they came, for further proceedings.

TOMPKINS and Others v. THE FLOYD COUNTY AGRICULTURAL AND MECHANICAL ASSOCIATION and Another.

A corporation may be required to answer, as a judgment debtor, in proceedings supplementary to executions.

Persons holding assets of a corporation, which is a judgment debtor and defendant, may be compelled to answer as to such assets, in a proceeding supplementary to execution.

In such proceedings the law fixes the first day of the ensuing term for answers to be made, but a different day may be designated.

APPEAL from the *Floyd* Common Pleas.

HANNA, J.—This was a proceeding, under the statute, supplementary to execution, against the association, averred to be a corporation, and *Winstandley*, who is alleged to have funds in his hands, etc.

It appears the complaint was filed in the vacation of the Court, and absence of the judge. The clerk issued an ordinary summons, requiring said defendants to appear on the second day of the next term of the said Court, and answer, etc. This was served on the association by reading to its president, and on the other defendant by reading.

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An order was also made and issued by said clerk, requiring said defendants to appear before the judge of said Court, on the *second* day of the next term, to answer, etc., as to property, etc. This was served by leaving a copy with the president and *Winstandley*.

The defendants, at the next term, entered a special appearance, for the purpose of moving to set aside said summons and order, and the service thereof, for reasons stated in writing. This motion was overruled. Defendants then being ruled to answer, said association filed a written motion to vacate the order made by the clerk, requiring them to appear and answer, etc., and also, at the same time, a demurrer to the complaint. *Winstandley* also demurred.

The motion to vacate, and the demurrers, were sustained, which rulings are complained of as erroneous.

The complaint avers, that, before that time, on, etc., a judgment had been recovered, by plaintiffs, against the said association, for, etc., in the Circuit Court, etc., and that an execution had, on, etc., been issued, and returned no property, etc., and that said judgment remains unpaid, etc., and charges that said defendant has notes, etc., to a large amount, not precisely known, and on persons unknown, etc., which ought to be applied, etc., but which are wrongfully withheld, etc., and that *Winstandley* has property to the amount of six hundred dollars, etc., and is indebted in a like sum, etc. The truth of the complaint was sworn to, etc.

The grounds of objection to the complaint and order appear to be, that such proceedings will not lie against a corporation; and that, by the order, they were directed to answer on the *second* day of the term of the Court; and that the allegations as to property, etc., are not specific enough.

As the statute provides the mode in which a corporation may answer in a case where it is disclosed that assets are held, etc., by such corporation, which belong or are due

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to the judgment debtor, we do not perceive but that it may, in the same manner, be required to answer as a judgment debtor. It may be possible that the proceeding may be maintained against the debtors, etc., of a corporation judgment debtor, where they are known and are made defendants, without the said corporation being compelled to be subjected to the examination provided for as to the execution defendant.

We are of opinion that those who may hold assets, etc., of a corporation, a judgment defendant, can be compelled to answer, and we are inclined to believe that the statute gives the authority, also, to proceed against the corporation; certainly it can be made a defendant so as to reach those who hold its assets, etc.; and, if so, why not for all purposes under the statute? *Bish v. Bradford*, 17 Ind. 490.

The complaint is specific enough as to the defendant *Winstandley*; but whether it is so against the corporation as to any other rights, credits, or effects, is doubtful.

As to the time at which said defendants were required to answer, etc., we are of opinion that the law fixes the time on the first day of the ensuing term, if no other is designated; but that a different day, even in term, may be fixed.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

John H. Stotsenburg and Thos. M. Brown, for the appellants.

Thomas L. Smith and M. C. Kerr, for the appellees.

DRESSER and Another *v.* Wood.

The clerk's certificate to the official character of a Justice of the Peace, should show that he was, at the time when the proceedings

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were had, or judgment was rendered, a Justice of the Peace, duly commissioned and qualified to act as such.

APPEAL from the *Allen* Circuit Court.

DAVISON, J.—Wood, who was the plaintiff, sued *John and Almira Dresser*, alleging, in his complaint, that, on the 4th of May, 1859, by the consideration of *B. B. Jackson*, a Justice of the Peace, duly commissioned and qualified, in and for the township of *Crane*, county of *Paulding*, and State of *Ohio*, he obtained judgment against the defendants for one hundred and fifty-three dollars and twenty-five cents, together with costs, taxed at one dollar and eighty cents, a transcript of which judgment, duly authenticated, is filed herewith, and plaintiff avers that said judgment remains unpaid, wherefore, etc. The transcript filed with the complaint reads thus:

“ *Smith Wood v. Joel Dresser and Almira Dresser*, demand one hundred and fifty-three dollars and twenty-five cents, Suit No. 60, Civil Action, April 28, 1859. Plaintiff filed a promissory note for collection, which is in these words:

“ *ANTWERP, December 25, 1858.*

“ One day after date we, or either of us, promise to pay to *Smith Wood*, or bearer, one hundred and fifty dollars, without any relief from appraisement laws.

“ *JOEL DRESSER,*
“ *ALMIRA DRESSER.*

“ *April 28, 1859.*—Issued summons of that date for the appearance of defendants on the 4th of May, 1859, at three o'clock, P. M., and delivered to *Stephen Schooly*, constable; summons returned by constable, indorsed.—Received this writ, April 24, 1859, and served the same on the within-named defendants, May the 4th, 1859. The defendants failed to appear at the time specified in the summons, and for one hour thereafter. It is, therefore, considered by me that the plaintiff, *Smith Wood*, recover of the defendants,

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Joel Dresser and Almira Dresser, one hundred and fifty-three dollars and twenty-five cents, with costs, etc.

“B. B. JACKSON, J. P.

“The State of Ohio, *Paulding* county, *Crane* township: I do hereby certify that the within and foregoing is a full and true copy from my docket of the proceedings had by and before me, at my office, in said township, in the within-named action. May the 11th, 1859.

“B. B. JACKSON, J. P., of the aforesaid township.

“State of Ohio, *Paulding* county, ss.: I, *Robert Purcell*, Clerk of the Court of Common Pleas within and for said county, certify that *B. B. Jackson*, Esq., whose genuine signature is affixed to the foregoing transcript, *was, at the time of signing the same*, a Justice of the Peace, duly authorized to act as such Justice, and that full faith and credit are due to all his official acts as such. Given under my hand and the seal of said Court, at *Paulding*, this 6th of June, 1859.

“ROBERT PURCELL, Clerk.”

The issues were submitted to a jury, who found for the plaintiff. Motion for a new trial denied, and judgment, etc.

The evidence is upon the record. It consisted, alone, of the transcript, with its authentications, as set forth in the complaint, and was admitted, over the objection of the defendants.

Against the validity of this evidence, it is contended that the certificate of the Clerk of the *Paulding* Common Pleas is defective, because it fails to allege that “*B. B. Jackson was*, when the proceedings were had or judgment rendered, duly commissioned and qualified to act as Justice of the Peace.” This position is well taken. See 2 R. S., p. 90, sec. 247. The certificate is not within the substantial requirements of the statute; and the transcript, for that reason, was not admissible as evidence.

Cable v. Smoyer.

Per Curiam.—The judgment is reversed, with costs. Cause remanded for further proceedings.

Crane and Smith, for the appellants.

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CABLE v. SMOYER.

The record on appeal to this Court must show that the bill of exceptions was filed within the term, or the time prescribed by the Court for its filing after the term, or it will not be considered as constituting any proper part of the record before this Court.

APPEAL from the *Carrol* Common Pleas.

DAVISON, J.—This was a proceeding commenced before a Justice of the Peace, under “An act concerning the unlawful detention of lands, and the recovery thereof.” “Approved May 19, 1852.” See 2 R. S., p. 490. Smoyer was the plaintiff below, and Cable the defendant. Before the justice, the defendant obtained a judgment, and the plaintiff appealed. In the Common Pleas, to which the cause was taken by appeal, there was a verdict for the plaintiff. Motion for a new trial denied, and judgment.

The record shows that this cause was tried on the 19th of September, 1860, and that the Court, on that day, upon its refusal to grant a new trial, granted defendant leave to file his bill of exceptions within ninety days. There are, in form, two bills of exceptions set out in the transcript, but they appear to have been filed on the 1st of January, 1861. This was not within the time prescribed by the order of the Court, and the bills are, therefore, no part of the record. *Simonton v. Plank Road Co.*, 12 Ind. 380. *Howard v. Burke*, 14 Ind. 85. *Peck v. Vankirk*, 15 Id. 154. *Maffit v. Pollard*, at the present term. As the assignments of error are all based upon the supposed bills of

Storm *v.* Worland.

exceptions, and they not being properly in the record, there is, of course, nothing before us.

Per Curiam.—The judgment is affirmed, with costs.

Henry M. Graham, for the appellant.

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DILLON *v.* DOENE.APPEAL from the *Madison* Circuit Court.

Per Curiam.—The judgment, in this case, is affirmed, for the reasons given in *McMahon v. Morrison*, 16 Ind. 172, the questions arising in both cases being similar.

Judgment affirmed, with costs.

John Brownlee, for the appellant.

M. S. Robinson, for the appellee.

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STORM *v.* WORLAND.

A plea to the jurisdiction should be verified, and, if not verified, should be disregarded; and, if such plea having been disregarded in a cause pending before a Justice of the Peace, the defendant plead to the merits, he waives all questions of jurisdiction over his person, and such questions can not be raised on appeal to the Common Pleas or Circuit Court, by amendment or otherwise.

APPEAL from the *Shelby* Common Pleas.

WORDEN, J.—Suit by *Storm* against *Worland*, before a Justice, to recover an account, etc. Appeal to the Common Pleas. Before the Justice, the defendant pleaded to the jurisdiction, that he was a resident of another township,

Robbins *v.* Dishon.

but did not aver, in his plea, that there was any Justice in his township competent to act, nor was his plea verified. The Justice seems to have disregarded this plea, and very properly, for the defects specified; whereupon the defendant pleaded to the merits, and judgment was rendered against him. In the Court of Common Pleas, the defendant asked and obtained leave, over the objection of the plaintiff, to amend his plea in abatement, by adding, that there were Justices in the township in which he resided competent to try the cause, and by adding thereto a verification. The plea, as thus amended, was demurred to, but the demurrer was overruled, and such proceedings were had as that the cause was dismissed for want of jurisdiction in the Justice.

This proceeding is erroneous. The plea, as filed before the Justice, was evidently bad, and properly set aside or disregarded.

When the defendant pleaded to the merits, and went to trial, he waived all questions of jurisdiction, as effectually as if he had not, in the first place, attempted to raise any. Having thus given the Justice jurisdiction by answering to the merits, he could not afterward, on appeal, raise any question as to jurisdiction over his person. *Ludwick v. Becknire*, 15 Ind. 198.

Per Curiam.—The judgment below is reversed, with costs, and the cause remanded.

Thomas A. Hendricks, for the appellant.

ROBBINS *v.* DISHON.

In an action by the payee, in his own name, upon a note made payable to him as trustee, etc., the words trustee, etc., will be regarded as mere description of the person, and an answer denying his title

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to, or right to recover upon, said note, should show that he has ceased to be such trustee, etc.

Where a township trustee lends money belonging to the township, in such manner as to make the loan thereof a conversion of the money to his own use, and takes a note payable to himself, as trustee, etc., he would be liable, on his bond, for said money, but the township would have no right of action on such note.

An answer to a complaint on a note, setting up an alleged former recovery for the amount of said note, in another action, should be accompanied by a copy of the proceedings and judgment in said action.

APPEAL from the *Orange Common Pleas.*

HANNA, J.—*Dishon* sued *Robbins* on a note made to the former, by the name of “*John Dishon*, trustee of *French Lick* township.” The action is in the usual form between individuals.

The defendant answered: 1. That the money sued for belonged to *French Lick* township, and not to *Dishon*, and, therefore, he was not the proper party. 2. That a judgment had been recovered in, etc., in which said sum sued for was included, against said plaintiff, said defendant, and one *Bush*, and in favor of one *McCracken*, trustee of *French Lick* township, which remains unreversed and unsatisfied. 3. Similar to the first, but avers that the note was taken for money of the township loaned, and that *Dishon* is no longer trustee, etc.

A demurrer was sustained to said answers, which raises the only question in the case. Judgment for the plaintiff.

Regarding the words “trustee, etc.,” as a mere description of the person, the first and third paragraphs of the answer are insufficient, because the first does not show but that *Dishon* was still trustee; and the third shows that he had converted the money of the township to his own use, and, by the act of loaning it, had made himself responsible, on his bond. The township could have no right of action on

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such note, whatever right, if any, might exist, in any contingency, to pursue the money itself. As to the second paragraph, there is no copy of said judgment, etc., filed with the same, and it is, therefore, bad.

Per Curiam.—The judgment is affirmed, with two per cent. damages and costs.

A. J. Simpson, for the appellant.

Thomas L. Smith, M. C. Kerr, and *M. S. Mavity*, for the appellee.

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SWEENEY and Another v. COCHRAN.

Where a complaint is filed in the usual form, on a note and account, and a copy of the note and a bill of particulars of the account are filed with the complaint, and also an affidavit, in attachment, entitled of the cause, and in the form prescribed by the statute, properly verified, is filed, and thereupon a writ of attachment is issued, it is error to quash the attachment for insufficiency of the affidavit.

APPEAL from the Boone Circuit Court.

Per Curiam.—*Sweeney and McClelland* sued *Cochran* on a note. They filed together, in the clerk's office, a complaint on the note, a copy of the note, and an affidavit and bond for an attachment. The affidavit for the attachment is in the language of the form prescribed by statute, (2 G. & H., p. 382,) and being filed with the complaint on the cause of action, and being titled with the names of the parties, etc., was sufficient. The Court quashed the attachment because the affidavit was not sufficient.

The judgment on the note is affirmed, that quashing the attachment is reversed, with costs.

W. Griffin, J. E. McDonald, and A. L. Roache, for the appellants.

Fowler *v.* Johnson and Others.

FOWLER *v.* JOHNSON and Others.

In 1837, A agreed, by title-bond, to convey to B, a certain tract of land, on the payment of two hundred dollars in hand, one hundred and thirty dollars on September 24th, 1837; one hundred and twenty dollars September 24th, 1838; one hundred and ten dollars September 24th, 1839, and received the payment in hand. In 1837, B assigned his interest in the bond to C, who assigned his interest to D, and the latter paid to A the first of the deferred payments. D failed to pay the last two installments, and, after his failure, in 1841, A, without having tendered a deed, or demanded payment of any one, sold the property to E, both A and E having notice of the assignment of the bond to D. E took possession of the property, and expended nine hundred dollars in improvements on it. In 1842, D assigned the bond to F, and in 1850, the latter tendered to A the balance due on the property, and demanded a deed, and A refused to receive the money, or make a deed, or have any thing further to do with it.

Held, that F was entitled to recover of A the amount of money paid, with interest, because the acts of A sufficiently indicate an election, on his part, to rescind the contract evidenced by the bond.

APPEAL from the *Elkhart* Circuit Court.

PERKINS, J.—On the 14th of January, 1837, *Henry Johnson* agreed, by title-bond, to convey a lot of ground to *Taylor* and *Garrison*, in consideration of five hundred dollars, to be paid by them as follows: Two hundred dollars in hand; one hundred and thirty dollars September 24th, 1837; one hundred and twenty dollars September 24th, 1838; and one hundred and ten dollars September 24th, 1839. The two hundred dollars were paid in hand. On the 9th of May, 1837, *Garrison* assigned his interest in the bond to *Taylor*. In August, 1837, *Taylor* assigned the bond to *Goldsmith*. In September, 1837, *Goldsmith* paid the installment of one hundred and thirty dollars which then fell due.

We now have *Goldsmith* holding *Johnson's* bond for a

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deed to the lot, on the payment of two installments of purchase money, one of one hundred and twenty dollars, in September, 1838, and one of one hundred and ten dollars, in September, 1839; three hundred and thirty dollars of the purchase money having already been paid. The two installments remaining unpaid, amount, we discover, to two hundred and thirty dollars. The entire installments, it will be seen, include sixty dollars of interest.

Goldsmith failed to pay the last two installments, and after his failure, to-wit., on the 21st of April, 1841, *Johnson*, without having ever tendered a deed to, or demanded payment of, any one, sold and conveyed the lot to one *Reuben Chapin*, for three hundred dollars, *Johnson* and *Chapin* both having notice of the assignment of the bond to *Goldsmith*. *Chapin* took possession, and expended upon the lot nine hundred dollars in improvements. In December, 1842, *Goldsmith* assigned the bond to *Fowler*, the plaintiff in this suit. Early in 1850, *Fowler* tendered the balance due on the lot, and demanded a deed, but *Johnson* refused to accept the money, or make, or cause to be made, a deed for the lot, or to have any thing further to do in the premises. In June, 1850, *Fowler* filed his bill in chancery, setting forth the facts and praying for the repayment of the purchase money paid on the bond, with interest, and for general relief. The issues in the cause were not made up, it seems, from the transcript, till 1857, when the cause was referred to a referee for trial, who reported in 1859, and upon whose report there was judgment for the defendants.

As to the practice to be pursued in suits tried by referees, see *Royal v. Baer*, 17 Ind. 382, and cases cited.

We need not inquire whether this suit, under the old practice, should have been on the law or chancery side of the Court, because, as the issues in it were not made up till long after the new code of practice was adopted, consolidating the two systems into one, if the pleading, called a bill in

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chancery instead of a complaint, contained facts sufficient to constitute a cause of action in a suit under the code, that was sufficient.

Did it contain facts sufficient? for, if it did, as the facts were found true by the referee, the plaintiff should have recovered. The referee decided against the plaintiff, on the ground that the laches were not such as to bar a specific performance, and that, as *Chapin* purchased with notice, such performance, so far as laches were concerned, could be adjudged against him; that the remedy of the plaintiff must be sought, therefore, by a suit for such performance, and not by a suit to recover back purchase money paid, and that, though the lapse of time was not such as to bar specific performance, yet the fact of *Chapin's* improvements, though he made them with notice, was a bar to a judgment for specific performance. Such, if we comprehend aright the referee's report, was the view he took of the case, and which was adopted by the Circuit Court in confirming his report. We think too narrow and partial a view was taken of the case below.

A party may have an election, either to enforce a contract, or to treat it as rescinded, and recover back the purchase money paid. In the case at bar, *Johnson* might have tendered a deed and demanded the purchase money, on the day the last installment fell due, and he would thus have saved himself from default, would have placed himself in a situation in which he could have stood upon the contract, and sued upon it, under the old system, in law, or in equity, to recover the balance of his purchase money; or he could have neglected to tender a deed on the day, and yet, within a reasonable time afterward, tendered it, and thus saved a right to sue in equity for his purchase money; but he could have sued, neither at law, nor in equity, without having first tendered a deed.

So, on the other hand, the holder of the bond, upon the

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day the last installment became due, could tender that installment, the previous one having been paid, and demand a deed, and thus enable himself to stand upon the contract, and sue upon it, at law for damages, in equity for specific performance. Or he could neglect to tender the balance of purchase money on the day, and yet tender it in a reasonable time afterward, and still, no other obstacle intervening, sue in equity for specific performance. And either party, under the code, could maintain the action for redress allowed by it, where either the action at law, or in chancery, could have been maintained under the old system.

But both parties to a contract may abandon it, so that it can not be made the ground of an action by either; in other words, parties may rescind a contract either before or after breach; and after breach, certainly, by parol; that is, by simple mutual consent. And where one desires, or proposes to rescind, the other may be in a situation to accept his proposition, concur in his wish to rescind, or to refuse so to do, stand upon the contract, and enforce it specifically, or sue for damages for its breach. In the case at bar, when *Fowler* tendered the purchase money, and demanded a deed, suppose *Johnson* had replied: "I'll have nothing more to do with the contract; I intend to rescind it;" and that *Fowler* had replied: "I do not intend to rescind; I will sue you on the contract." This course he might have taken. But, suppose again, he had replied: "Very well; rescinded let the contract be;" what would have been the result? The contract would have been rescinded by mutual consent, and the legal consequence would have followed, that the parties must be placed, as near as possible, in *statu quo*, to do which *Johnson* would have to return the purchase money he had received, etc.

Now, upon the facts in this case, such consent to rescission is inferable. After the day on which, at law, the last installment of the purchase money was to be paid, *Johnson*, instead

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of tendering the deed and demanding the money, thus standing upon the contract, not only neglected to do this, but conveyed the property to a third person; and when performance of his original contract was demanded of him, he refused to have any thing further to do with the matter. Here was evidence of a determination to rescind on his part. Now, what did *Fowler* do? He proceeded to sue to recover back his purchase money. This was a concurrence in the determination of *Johnson* to rescind. See cases in point in that valuable work, the 2d ed. of *Fry on Specf. Perf.*, chap. 23, commencing top p. 339. See, also, *Cromwell v. Wilkison*, 18 Ind. 365.

Per Curiam.—The judgment below is reversed, with costs. Cause remanded for a new trial, with leave to amend, etc.

J. H. and M. Baker, for the appellants.

J. A. Liston, for the appellees.

THE STATE on the Relation of Conner *v.* REYNEARSON.

A prosecuting witness in a prosecution for bastardy may, in open Court, dismiss the proceeding, under the approval of the Court, but if she compromise out of Court, such compromise must be specially pleaded, by the defendant, to be available.

APPEAL from the *Hendricks* Circuit Court.

Per Curiam.—The prosecuting witness may appear in open Court and dismiss a prosecution for bastardy, under the approval of the Court.

If, however, she compromise the matter out of Court, to be available, such compromise must be set up in an answer, to which replies may be filed. *The State v. Wilson*, 16 Ind. 134.

Tousey v. Taw and Another.

The judgment is reversed, with costs. Cause remanded for further proceedings, etc.

Nave and Witherow, for the appellant.

L. M. Campbell, for the appellee.

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TOUSEY v. TAW and Another.

The case of *Bingham v. Kimball*, 17 Ind. 396, approved and followed.

APPEAL from the *Vigo Circuit Court*

PERKINS, J.—This was an action brought against *Tousey*, as acceptor upon a bill of exchange, as follows:

“\$1,515 $\frac{7}{100}$

PHILADELPHIA, Sept. 19, 1859.

“Ninety days after date, pay to the order of ourselves, fifteen hundred and fifteen $\frac{7}{100}$ dollars, value received, and charge the same to account of TAW & BEERS.

“To R. Tousey, Esq.,

“Treasurer *Terre Haute, Alton and St. Louis R. R. Co.*,
Terre Haute, Ind.”

And accepted: “R. Tousey, Treasurer.”

Tousey answered in two paragraphs. 1. The general denial. 2. That the *Terre Haute, Alton and St. Louis Railroad Company* is a corporation, and was indebted in three notes to *Taw and Beers*, given for oil furnished to the company; that the bill was drawn and accepted for the purpose of consolidating the debt into one obligation, and was for no other consideration; that *Tousey* was treasurer and financial agent of the company, with full authority to accept the bill; that the bill was accepted for the company, and that it was known to *Taw and Beers*, and so understood to be the acceptance of the corporation, and not that of *Tousey* personally.

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To this paragraph *Taw* and *Beers* demurred, and the demurrer was sustained by the Court, and exception reserved. At the trial the bill and acceptance were the only evidence given in the cause, and the Court found against *Tousey* for one thousand six hundred and seventy-one dollars and nine cents, and overruled a motion for a new trial; which decision of the Court was also excepted to, and *Tousey* appeals.

This case falls exactly within *Bingham v. Kimball*, 17 Ind. 396. It is also contended that the suit should be against the corporation, on the ground that the note appears, on its face, to be that of the corporation, executed by her agent, and to this point the following, among other authorities, are cited. *Herod et al. v. Rodman*, 16 Ind. 241. *Bank of Genessee v. Patchin Bank*, 19 (N. Y.) Rep., p. 312. *F. and M. Bank v. Troy City Bank*, 1 Doug. (Mich.) Rep. 458. Also, 16 M. & W. 880. 21 Conn. 627. 11 Ohio St. Rep. 153. 1 Am. L. Cases, 3d ed. 602. Ang. and Ames on Corp., 3d ed. 285. 1 Par. on Cont. 47. Story on Agency, sec. 154. See also, especially, *Houston v. Washington Township*, etc., 18 Ind.

The judgment is reversed, with costs. Cause remanded, etc.

J. P. Usher, Ballard Smith, Usher and Patton, for the appellant.

Richard W. Thompson, for the appellees.

PARKER v. THOMAS.

Where the rights of a corporation are derived from a public law, the fact that the agents of the corporation, in order to induce others to contract with it, or subscribe to its capital stock, made false and fraudulent representations to them as to its rights, constitutes no bar to an action on such contract or subscription.

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Where a subscription is made to the capital stock of a railroad company, upon the express condition that the road shall be located within a certain distance of a specified place, such condition will be construed to be a condition precedent; and the giving of unconditional notes for such subscription, unless so intended by the parties, does not waive the performance of the condition precedent; and the failure of such performance may be pleaded in bar of a recovery on such notes.

Where an answer consists of several paragraphs, and a single demurrer is filed thereto, in which the plaintiff says "he demurs to *each* paragraph of the answer," etc., the demurrer must be taken distributively, and is equivalent to a separate demurrer to each paragraph, and may, therefore, be overruled as to part, and sustained as to part of the paragraphs.

APPEAL from the *Shelby* Common Pleas.

WORDEN, J.—This was an action by *Parker* against *Thomas*, upon promissory notes executed by the latter to the *Fort Wayne and Southern Railroad Company*, and by the company indorsed to the plaintiff. The notes bear date December 29, 1853.

The defendant answered in four paragraphs, in substance as follows:

1. That, on the — day of August, 1853, he subscribed for sixteen shares of the capital stock of the railroad company, on the following conditional subscription, viz.: "We, the undersigned, promise to pay to the president and directors of the *Fort Wayne and Southern Railroad Company* twenty-five dollars for each share of stock set opposite our names, as follows, to-wit: four per cent. in sixty days, and the balance in six semi-annual payments, *provided* that said road is located within one-fourth of a mile of the plat of the town of *Westport*, in *Decatur* county, *Indiana*; and when said road is so located, we authorize the agents of the company to transfer our names and stock into the regular stock book of the company;" that afterward, on the 9th of

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December, 1853, he paid the four per cent. on the subscription, and gave his notes for the balance, which are the notes now sued upon; that at the date of the subscription of the stock, and of the execution of the notes, he was a resident of *Decatur* county, and the owner of real estate therein, and desirous of having the road located and constructed through said county; that the charter of the company contains the following provision: [here follows a provision in the charter of the company which it is unnecessary to set out in this opinion;] that the company, through her agents and servants, in order to induce the execution of the subscription and the notes, falsely, etc., represented that the company had a right to construct a railroad from *Muncietown* to *Jeffersonville*, passing through *Rushville*, *Greensburg*, and *Westport*, in *Decatur* county, *Vernon*, in *Jennings* county, thence to *Jeffersonville*; and that said towns of *Rushville*, *Greensburg*, *Vernon*, and *Jeffersonville* had been fixed upon as the route, and that these had been determined upon as the points through which the road would pass, and that *Jeffersonville* had been fixed upon as the southern terminus of the road, by a resolution of the board of directors; that said representations were false, and known to be so by the agents and servants of the company; that by the charter of the company she had no right to locate and construct a road from *Muncietown* to *Jeffersonville*; that on the 5th of October, 1853, the company fixed upon and located the southern terminus of the road at *Columbus*, in *Bartholomew* county, by a resolution of her board of directors, which resolution is set out; that said defendant, at the time, etc., was ignorant of such location, which would make it impossible for the company to make *Greensburg* and *Westport* points, and *Jeffersonville* the southern terminus, in accordance with the representations; also, that there never was a legal location of the southern terminus of the road at *Jeffersonville*.

2. That the defendant subscribed for stock and gave the

Parker & Thomas.

notes as set forth in the first paragraph; that the company, by her agents and servants, in order to induce the execution of the notes, falsely, etc., represented to the defendant, in a public speech, made at the *Methodist Church* in *Westport*, that the company was amply able to build the road; that she had stock already subscribed sufficient to do so, and that the final completion within three years was a fixed fact; that the stock would pay heavy dividends, and be the best investment the defendant and others present at the meeting could make; that the subscription in *Decatur* county should be used in the construction of the road through that county, only, and would not be called for until the work was progressing; that if the people of *Decatur* county would subscribe a small amount more to make up their quota, the middle division would be put under contract during the coming winter; all of which representations were false, and known to be so by said agents and servants; that at the time, etc., the defendant lived in a secluded and retired portion of the county, and was ignorant of the means and prospects of the company; that at the time, etc., the company had not the means to construct the road, and is now insolvent, and has abandoned the construction of the road.

3. That at and prior to the time of the subscription, the defendant was the owner of a large amount of real and personal property, at and near the town of *Westport*, and engaged in the mercantile business at said town, which property would be greatly enhanced in value, and which business would be greatly improved and promoted by the construction of a railroad through or near said town; that about the time of the subscription the company caused her agents to go over said county of *Decatur*, among the people, in different directions, which agents falsely and fraudulently represented that the railroad passing through, etc., near said town of *Westport*, would be speedily constructed, if the

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people of the county of *Decatur* would take hold and subscribe stock to take the same through said county; that the company had ample means to construct and furnish the road, already subscribed; that it would be finally completed in three years; that it would be, in a very short time, located and put under contract from *Muncie*, in *Delaware*, to *Vernon*, in *Jennings* county; that said agents held meetings in *Westport* and other places in the county, which defendant attended, where said agents repeated, in the strongest terms, the aforesaid false representations as to the ability of the company to construct and put in operation their road, and that she would forthwith proceed to locate and put the same in operation between said points; by means of which etc., the public was excited and amazed, and made to believe that the company had the ability, and would so locate and construct the road. The defendant, relying on said false representations, and believing the same to be true, subscribed to the capital stock of the company, as set forth in the first paragraph of the answer. And afterward, on, etc., the said company, by her agents repeating said false representations, and representing that it would be to the interest of the company to close up said subscription by giving a note for the amount thereof, and would not injure the defendant, as the company had ample means, and would immediately go to work and locate, and let the work on the central division of the road, and construct the road, as soon as the same could be done, with reasonable diligence; and that the same would be complete, within three years, within one-fourth of a mile of said town of *Westport*, according to the conditions of the subscriptions, and that, if the defendant and others did not close up their subscriptions, the books of the company would be closed, and they would not be permitted to take said stock; and that the notes, when given, would be applied exclusively to the construction of the road through said county of *Decatur*, the defendant,

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relying upon all of said false and fraudulent representations, and believing the same to be true, made and executed the notes on which the suit is brought, for no other or different consideration; that the company has not located or constructed the road within one-fourth of a mile from *Westport*, nor at any other place within or through said county; that the said company had not, at the time when, etc., nor has it yet, the means subscribed to construct said road, but has been and is insolvent; all of which representations were false, and known to be so by said agents, when they were made.

4. That the defendant was the owner of property, and engaged in the mercantile business, as in the last paragraph set forth; that, in order to aid in the construction of the road which was to run through or near said town of *Westport*, he made the conditional subscription set out in the first paragraph; that afterward, on the 1st of December, 1853, the company, by her agents, falsely and fraudulently represented that she was amply able to go on and locate and construct said road, and complete the same in three years, and that she was about to, and would forthwith proceed to construct the same through the county of *Decatur*, and within one-fourth of a mile of *Westport*, according to the terms of the subscription, and that to enable her to do so, it was important and necessary, and that it would be better that said defendant should give his notes for the amount of his subscription, that the same might be applied to the construction of the road through said county; and the defendant, confiding in these representations, and believing them to be true, and being ignorant of the facts, executed the notes described in the complaint; that the company has not yet located or constructed her road within one-fourth of a mile of the plat of the town of *Westport*, or at any other point near said town, and, at the time, was not about to proceed, etc.; that said company was, at said time, entirely unable to

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construct said road, etc.; that she had not the means to construct the same, and that she has since wholly abandoned said route; that she has not performed any work thereon between the town of *Muncie*, in *Delaware* county, and *Vernon*, in *Jennings* county, and does not intend to do so; that at the time of making the false representations, the company had no intention of locating or constructing her road within one-fourth of a mile of the town of *Westport*, or at any other point running through said county, but knowing that unless said defendant could be induced to believe that the road would be speedily located and constructed, and that the company had the means to locate and construct the same as aforesaid, he would not give his said notes, the company made said false and fraudulent representations to deceive and defraud him, wherefore, etc.

A demurrer was overruled to each paragraph of this answer, and the plaintiff excepted. Issues were formed and tried, resulting in a verdict and judgment for the defendant.

Were the several paragraphs of the answer good? This is the question that first claims our attention.

The allegation in the first paragraph, that the company falsely represented that she had a right to construct a road from *Muncie* to *Jeffersonville*, adds nothing to the other facts therein stated. That representation was upon matter of law. Whether the company had such right depended upon her charter, which was a public law, and of which the defendant was bound to take notice.

The other allegations in the several paragraphs, of representations in respect to the ability of the company to construct the road, and the time within which it would be done, etc., are not sufficient to avoid the contract. The case of *Bish v. Bradford*, 17 Ind. 490, is decisive upon these questions.

The first paragraph alleges that the company had, by resolution, fixed upon *Columbus*, in *Bartholomew* county, as the

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southern terminus of the road, thereby rendering it impossible to make *Greensburg* and *Westport* points, etc.

The third alleges that the company had not located or constructed the road within a fourth of a mile of *Westport*, etc.

The same allegation is to be found in the fourth. Outside of these allegations, none of the paragraphs set up matter which is a valid defense.

The second paragraph is clearly bad, for the double reason that the representations are not such as to bar the action, and it is not alleged that the defendant believed them, or relied upon them, or that his subscription was, in any degree, induced by them.

Returning now to the first, third, and fourth paragraphs, the question arises: Whether they were good, in consequence of the allegations denying the location of the road as provided for by the terms of the subscription? The original subscription was upon the condition that the road should be located within one-fourth of a mile of the plat of the town of *Westport*. This, we think, was a condition precedent. *Taylor v. Fletcher*, 15 Ind. 81. Had the suit been upon the subscription, it is clear enough, on general principles, that no recovery could be had without showing that the road had been located as provided for in the subscription. Did the giving of the notes waive the condition? The notes were six in number, and unconditional, each for the amount of the semi-annual installments, and coming due semi-annually, corresponding with the terms of the subscription. In this respect, the case differs materially from that of the *Evansville, etc. Railroad Company v. Dunn*, 17 Ind. 603. We are not prepared to say that the giving of the notes waived the condition. No doubt, if it was the intention of the parties to waive the condition, effect should be given to such intention; but the facts, as shown, do not, of themselves, amount to such waiver. It seems to follow that the paragraphs, except the second, were good.

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Should the cause be reversed because of the overruling of the demurrer to the second paragraph? Here arises a question of practice. The demurrer was as follows: "The plaintiff demurs to *each* paragraph of the answer," etc. The appellee insists that the demurrer was properly overruled if there were any good paragraphs. We think, however, that the demurrer should be taken distributively, and that it is equivalent to a separate demurrer filed to each paragraph. It might well be overruled as to some and sustained as to other paragraphs. It is not like a demurrer that must be *wholly* sustained or overruled.

If the evidence is not to be deemed in the record, and counsel for the appellee claim that it is not, then the judgment must be reversed for the error in respect to the second paragraph, for, in that case, we can not say that the verdict for the defendant was not based upon the defense set up in that paragraph; we can not say that the merits of the cause have been fairly tried and determined. *Rose v. Wallace*, 11 Ind. 112. A bill of exceptions sets out evidence, but the thirtieth rule may not be strictly complied with. If we take it that the evidence is all in the record, it shows that the road was located as provided for in the subscription. That it was not so located, we have seen, was the only valid defense set up. This defense, the proof in the record shows, did not exist. If the evidence be deemed in the record, a motion for a new trial, which was properly made, should have been sustained. So that, whether the evidence be or be not in the record, the judgment must be reversed.

A cross error is assigned. The plaintiff, for a reply to the alleged location of the southern terminus of the road at *Columbus*, etc., alleged, that afterward, by a resolution of the board of directors, the company rescinded the former order, and ordered that the road be located on a line passing through *Greensburg*, *Westport*, and other points, termina-

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ting at *Jeffersonville*, etc. To this replication the defendant demurred, but the demurrer was overruled, and the defendant excepted. It is claimed that herein the Court erred. The position assumed is, that as the company had power, by her charter, to fix upon the southern terminus of her road, and had exercised that power by fixing it at *Columbus*, the power was exhausted and the location could not be changed. Whatever might be the law, where no statutory authority is given to make a change, we think the charter of the company gave her the right to make such change. The thirty-first section of the charter seems, by necessary implication, to confer the right to make such change. Local Acts, 1849, p. 355.

Per Curiam.—The judgment below is reversed, with costs, and the cause remanded for further proceedings.

B. W. Wilson, for the appellant.

James Gavin, Oscar B. Hord, and Cortez Ewing, for the appellee.

NOTE.—There were contained, by agreement, in the same record in which the above entitled cause is found, twelve other causes, all of which are so nearly alike, in every essential particular, as to render the foregoing decision applicable to each, and the same judgment was therefore entered in each.

HEADLEY *v.* MATTHEWS and Another.

APPEAL from the *Tippecanoe* Circuit Court.

Per Curiam.—This was a complaint by *Headley* against *Matthews* and *Tufts*, under the statute concerning occupying claimants. Demurrer to the complaint sustained, and judgment for the defendants.

The complaint is somewhat lengthy, and it will subserve no good purpose to set it out here at length. We see no objection to it. No brief has been filed by the appellees

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pointing out any defect, nor advising us upon what ground the demurrer was sustained.

The judgment below is reversed, with costs, and the cause remanded.

H. W. Chase and J. A. Wilstach, for the appellant.

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Lines and Others v. Mack and Others.

A note, made payable at a place in another State, and bearing a higher rate of interest than is lawful in this State, but not a higher rate than is allowed by the law of the place where it is payable, may be enforced in this State according to its tenor.

APPEAL from the *Grant Common Pleas.*

WORDEN, J.—Action upon a promissory note of the following tenor:

“\$ 259.60.

CINCINNATI, April 22, 1857.

“Six months after date, we, the subscribers, of *Fairmount*, County of *Grant*, State of *Indiana*, promise to pay to the order of *Mack and Brothers*, two hundred and fifty-nine dollars and sixty cents, without any relief whatever from valuation or appraisement laws, value received, payable at their counting rooms, with ten per cent. interest after maturity.

S. LINES & Co.

“Due October 25, 1857.”

Averment that the note was made in *Ohio*, and there payable, setting out the statute of that State, authorizing interest at the rate specified in the note.

Judgment for the plaintiffs for the amount of the note, with interest at the rate specified, after deducting a payment.

The only question in the case is, whether there was sufficient proof offered to the Court below, the cause having

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been tried by the Court, to show that the note was made in the State of *Ohio*, or was payable there.

There was, perhaps, no legitimate proof that the note was made in *Ohio*, but it seems to us that the proof was sufficient to show that it was payable in that State. The note bears date at "Cincinnati," and is payable at the counting rooms of the plaintiffs.

James F. McDowell testifies that the counting rooms of the plaintiffs are in the State of *Ohio*; that he has transacted business with the plaintiffs, and is satisfied that their place of business is in *Cincinnati*, in the State of *Ohio*. To be sure, he also states, on cross-examination, that he did not see the note executed, and knew nothing of it until it was sent to him for collection. He says, further, that he is not certain that he was ever at the plaintiffs' counting rooms, and don't know that he is acquainted with plaintiffs, but has transacted business for them, and saw one of the firm, or their agent, at *Marion*. It is objected that this testimony is all hearsay. We do not think so. The witness testifies that he has transacted business for the plaintiffs, and is satisfied that their place of business is in *Cincinnati*, in the State of *Ohio*. This portion of the testimony does not appear to be hearsay. How the witness became "satisfied" of the fact, does not very clearly appear, unless it be from the knowledge he acquired in the transaction of business for the plaintiffs. The record does not show that this portion of the evidence is objectionable; and, coupled with the place at which the note is dated, it shows sufficiently that the note was payable in the State of *Ohio*, and therefore governed by the law of that State.

Per Curiam.—The judgment below is affirmed, with costs and five per cent. damages.

J. H. Jones, for the appellants.

Rockey v. The State.

HAYS v. MARKS.

Where a motion, based upon an affidavit, is made to set aside a default, and it is overruled, and the party excepts, and desires to have the error, if any, reviewed in this Court, he should make such affidavit a part of the record by his bill of exceptions.

APPEAL from the *Montgomery* Circuit Court.

Per Curiam.—Action by *Marks* against *Hays* to recover certain real estate. Judgment, by default, for plaintiff.

Motion to set aside the default overruled, and exception. The affidavit, on which the motion was based, is not set out in the bill of exceptions, and thereby made a part of the record; hence, we can not say that any error was committed, but must presume in favor of the ruling of the Court.

The judgment is affirmed, with costs.

J. F. Kibbey, Peelle and Davis, G. D. Hurley, for the appellant.

S. C. Willson, for the appellee.

ROCKEY v. THE STATE.

APPEAL from the *Brown* Common Pleas.

Per Curiam.—It does not appear that the defendant was arraigned or pleaded. *McJenkins v. The State*, 10 Ind. 140. The judgment is reversed.

N. T. Hauser, for the appellant.

Francis T. Hord, for the appellee.

Conklin *v.* Carver and Another.

CONKLIN *v.* CAREVER and Another.

The act of January 27, 1853, supplemental to an act concerning liens of mechanics, etc., only applies to persons whose business it is to feed cattle, etc., and was not intended to include an isolated case of feeding, etc.

APPEAL from the *Fayette* Circuit Court.

HANNA, J.—Suit by the appellant to recover the value of a horse colt, averred to have been taken, sold, and converted to their use by the defendants.

Answer. 1. That the defendants were farmers; that the plaintiff, in November, placed with them two colts, to be kept, fed, etc., until the first day of March, etc. The answer then sets out such facts as constitute a defense, if the statute of January 27, 1853, supplemental to an act concerning liens of mechanics, etc., includes a case like this. *Acts*, p. 86.

It is insisted that no one is entitled to the benefit of a lien, under the statute, unless he is a livery stable keeper, or his business that of feeding horses, etc. It is not alleged that such was the business of the defendants, nor that they were engaged in feeding, etc., any further than the allegation that they undertook to feed for the plaintiff, tends to show that fact.

We are of opinion that it should have been alleged and shown that the business of the defendants was to feed, etc., and that this statute was not intended to include an isolated case like this.

The demurrer should have been sustained to the answer.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

John S. Reid, for the appellant.

N. Trusler, for the appellees.

Willhelm and Another v. Bull.

SMITH v. THE STATE.

Informations for felonies must aver the existence of the facts necessary, to give the Court of Common Pleas jurisdiction to try the case.

APPEAL from the Kosciusko Common Pleas.

Per Curiam.—Information against the appellant for a rape. Trial and conviction. The judgment against the accused must be reversed. The *information* alleges no facts giving the Court jurisdiction, either the consent of the accused, or otherwise. That the *information* must allege the facts giving jurisdiction, as they are traversable, has been decided in numerous cases.

The judgment is reversed, and the cause remanded.

The clerk will give the proper notice for a return of the prisoner to *Kosciusko* county.

J. E. McDonald and A. L. Roache, for the appellant.

WILLHELM and Another v. BULL.

Where judgments are taken by default, a motion to set aside the default, or for a review, should precede an appeal to this Court.

APPEAL from the Madison Circuit Court.

Per Curiam.—In this case there was judgment by default, and no steps taken below to set it aside, or to review the judgment for error. According to numerous rulings of this Court, we can not examine the record for errors, especially as the time had not elapsed when this appeal was taken, within which one of the remedies above alluded to would be barred. The policy is to compel parties to obtain redress in the Courts below, where opportunity remains to do so.

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The appeal is dismissed, with costs.

W. R. Pierse, H. D. Thompson, and R. N. Williams, for the appellants.

John Brownlee, for the appellee.

WINSLOW and Another v. BULL.

Per Curiam.—The appeal in this cause is dismissed, with costs. The case is in all respects like that of *Wilhhelm et al. v. Bull*, at the present term.

W. R. Pierse, H. D. Thompson, and R. N. Williams, for the appellants.

John Brownlee, for the appellee.

NOTE.—Another cause between the same parties, in all respects like the above entitled cause, is dismissed for the same reason.

MURPHY and Another v. TONER.

A agreed to sell and deliver to B, between ninety and one hundred well-fatted, corn-fed hogs, each weighing, at least, one hundred and eighty pounds net, to be delivered at L, between the 1st and 15th of December, 1857, at the option of B, and the latter agreed to pay for them at the rate of six dollars per one hundred pounds net, on delivery, and to notify A of the particular time of delivery, between the days aforesaid; and if the cholera should break out among his hogs, A should only be required to delivery such of his hogs as remained sound, and should not be required to make up the number, and B shall advance one hundred dollars on the contract, which was done. B notified A to deliver the hogs on the 2d of December, 1857. They were not then delivered, but A, in

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answer to an action for such failure to deliver, averred, that "on or about the 6th of said month," he tendered them to B, who refused to receive them, to which answer B replied, that when A brought the hogs into the vicinity of L, he informed B of the fact, and, also, that said hogs were not such as filled the contract as to weight, but that he was ready to deliver them, and, thereupon, B refused to receive them; and that on the 10th of December, 1857, A purchased other hogs of other persons, which were sufficient in weight, and tendered them, which B then also refused to receive. *Held*, that in view of the shortness of the pork season, and the great importance of promptness in the delivery of hogs, A should have offered to deliver the hogs sooner than he did, and B was under no obligations to receive them for that reason, and for the further reason that they were not of sufficient weight, and much less was he bound to wait for A to purchase the hogs of others to fill his contract, after having been notified to deliver them.

APPEAL from the *Fulton* Circuit Court.

PERKINS, J.—*Murphy & Goodwin* sued *Toner*, for a breach of the following contract:

"Agreement, made this 16th day of September, 1857, between *Albert D. Toner*, of the one part, and *Robert P. Murphy* and *Wesley Goodwin*, composing the firm of *Murphy & Goodwin*, of the second part, witnesseth: That the said *A. D. Toner* agrees to sell and deliver to the said *Murphy & Goodwin*, between ninety and one hundred well-fatted, corn-fed hogs, each hog to weigh, at least, one hundred and eighty pounds net, and to deliver said hogs in *Logansport*, *Cass county, Indiana*, between the 1st and 15th days of December, 1857, at the option of *Murphy & Goodwin*. The said *Murphy & Goodwin* agree, on their part, to pay at the rate of six dollars for each one hundred pounds net, of hogs so delivered. The said *Murphy & Goodwin* shall previously notify the said *A. D. Toner* of the particular time of delivery. If a disease, called the hog cholera, should break out among the hogs of the party of the first part, he is only to

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deliver so many of his hogs as shall remain sound, and is not bound to make up the number specified above. The said *Murphy & Goodwin* agree to advance to the said *A. D. Toner*, one hundred dollars on the contract, by the 26th inst., on which advance he will allow them interest up to the delivery of said hogs.

“Sept. 16, 1857.

“A. D. TONER,

“MURPHY & GOODWIN.”

Murphy & Goodwin advanced the one hundred dollars as stipulated.

The breach they allege, in their complaint against *Toner*, is, that he failed, after notice given, etc., to deliver the hogs as required by the agreement.

The defendant answered, that he received notice from *Murphy & Goodwin*, “on or near” the 2d day of December, 1857; that he resided at, etc., where his hogs were; that he used reasonable diligence, as to time, in complying with the notice; that “on or about” the 5th of December, he had the hogs in the vicinity of *Logansport*; that “on or about” the 6th of said month he tendered them; that the plaintiffs refused to receive them; that they, immediately after said tender and refusal, left for Cincinnati, and did not return to Logansport till the 15th of said month; that he, the defendant, was at trouble and expense, etc.

To this the plaintiffs replied; that after the defendant, *Toner*, had driven his hogs to the vicinity of *Logansport*, pursuant to the notice for delivery from the plaintiffs, he called on the plaintiffs and informed them of the fact, and also, that they were not hogs that filled the contract as to weight; that some of them fell below one hundred and eighty pounds net; but that he was ready to deliver them; whereupon the plaintiffs refused to receive the hogs, under the contract; that afterward, to wit: on the 10th of December, the defendant, *Toner*, purchased of other persons twelve hogs, weighing one hundred and eighty pounds net, to

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make up the deficiency in the lot previously tendered, and afterward, to wit: on the 12th of December, 1857, again tendered the hogs of the number and character required by the contract, which the plaintiffs then refused to receive, etc.

To this reply the Court sustained a demurrer, and the defendant had final judgment in his favor.

There is a bill of exceptions copied into the transcript, but it was not filed within the time fixed by the Court when time for filing was given, and it can not, therefore, be noticed.

The only question presented to this Court, by the record, is upon the ruling of the Court below, in sustaining a demurrer to the plaintiff's reply to the answer.

No motion was made, it may be observed, to cause the reply to be rendered more certain and definite in its statements. The only objection was by demurrer, for want of sufficient facts.

It will be further noticed, that the answer is not precise, as to the day on which the tender set up was made, the allegation being "on or about," etc.; but it is manifest that the answer and reply relate to the same period of time, and the same transaction, because the answer avers that the plaintiffs left for Cincinnati, immediately after the tender it relies on was made, and did not return till the 15th of the month, perhaps a day after any tender, under the contract, could have been required or made. The answer, then, relies on a tender, and a single one, of the hogs, according to the contract. The reply avers that there were two tenders, one, and the first one, of hogs not as contracted for, which tender was refused; that the defendant then procured other hogs, filling the requirements of the contract, and tendered them, which tender was also refused; and this second tender must be the one relied on by the defendant. The demurrer to the reply admits the two tenders. The reply is something in the nature of a new assignment at common law.

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Here, then, we have a complaint alleging, for breach of contract, the non-delivery of the hogs. Answer, alleging a tender. Reply, that the tender set up in the answer was a second tender, made after time, and for that reason rejected; that there had been a previous tender made at the proper time, but not of the requisite quality of articles, and which was, for that reason, rejected. It will be observed, that there was not a fixed day on which the delivery of the hogs, or their tender, was to be made; but it was to be made in a reasonable time after notice. Hence, the propriety of the form of reply to the answer adopted; the answer simply averring a tender after notice.

The validity of the reply must be determined by the construction of the contract.

That contract required *Toner* to deliver to the plaintiffs, at *Logansport*, in a reasonable time after notice, at least ninety-one hogs, sound, each weighing as high as one hundred and eighty pounds net, and each and all corn-fed, that is, fattened on corn. It is contended by the plaintiffs, that the purchase was of the particular hogs then being owned and fed by the defendant; and there is much in the contract and facts to justify the position: as the number of the hogs; the fact that if the cholera should get among them and they die, the defendant was not to replace them; and the fact that the hogs, when he received notice, were at his home in *Fulton* county, etc. See *Daggy v. Cox*, at this term. But we shall not decide the case upon this construction of the contract. At all events, *Toner* was, with reasonable promptness, after he received notice, to deliver the entire number of hogs contracted for. We know, as matter of general knowledge, that, owing to the shortness of the pork season, and the uncertainty of weather in which slaughtered hogs can be saved, it may be of great importance to packers to have hogs contracted for delivered at the day, and even hour, specified. We are clear, that the plaintiffs were

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not bound to wait for *Toner* to purchase the hogs to fill his contract, after receiving notice to deliver them. And as he had not the hogs, required by the contract, to deliver within a reasonable time after the notice, according to the reply, the plaintiffs, after refusing to receive such as he then offered, were not bound to accept such as he might tender at a subsequent day. The execution of the contract by *Toner*, if so required by the plaintiffs, was a single entire thing, to be performed at a proper time; and if he failed in the attempt to execute it at that time, he could not claim, as a right, the privilege of executing it at another time. If he had obtained the consent of the plaintiffs that he should have further time to purchase hogs and fulfill his contract, a different question might be presented.

Per Curiam.—The judgment is reversed, with costs. Cause remanded with leave to amend, etc.

E. Walker and L. Chamberlin, for the appellants.

D. D. Pratt, for the appellees.

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PATTON *et ux. v. STEWART.*

Where a warrant of attorney authorizes A, or any other attorney of the Court in which the judgment is to be confessed, to appear and confess a judgment, and A, and B, another attorney of said Court, appear and confess the judgment, the same will be valid.

When the sheriff is about to sell land on an ordinary judgment, it is the right of the execution-defendant, and, perhaps, of the creditor, to claim that it should be sold in parcels, and to direct which parcel shall be first offered; and, if the land can be well sold in parcels, it is the duty of the sheriff thus to sell it; and the sale is voidable, but not void, if he does not.

Where a warrant of attorney, to confess a judgment and decree of foreclosure upon a mortgage and notes, in part due and in part not

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due, provides, that "in the final judgment herein, the Court shall decide upon what subsequent default execution shall issue herein to collect the balance, in case the defendants shall pay the amount [installment] due, before the sale of the premises; and that, in case of sale, the whole of the plaintiff's debt and costs be paid; and the residue, if any, be paid to the defendants; and that they, (the defendants,) fix what parts, if the same be susceptible of division, be first sold," such warrant places the judgment, confessed in pursuance thereof, upon the footing of one where the installments are all due, and the Court need make no inquiry touching the divisibility of the mortgaged property, and the sale should be for the entire amount of the debt, and it is the business of the parties interested in the property, and the sheriff, to determine upon the divisibility of the premises.

The vendor's lien for purchase money, of land sold by him, is paramount to the title of the wife by virtue of the marriage; but the wife, upon the foreclosure of a mortgage given to secure the payment of purchase money, in which she joined with her husband, is entitled to redeem, and no personal judgment can be taken against her on such foreclosure.

A married woman can not bind herself by merely signing a warrant of attorney to confess a judgment; and her acknowledgment of the same before the clerk of the county court gives it no validity, as he is not authorized to take such acknowledgment.

APPEAL from the *Vigo* Circuit Court.

PERKINS, J.—Complaint for a review of a former judgment. Complaint dismissed on demurrer.

The judgment was for money secured by notes and mortgage, rendered on a foreclosure of the latter, and was entered by confession, upon a warrant of attorney, signed by *William Patton* and *Sarah*, his wife. The warrant authorized one *Scott*, or any other attorney of the Court, to confess the judgment, and to release all error. The entry of judgment did not contain a formal release of errors, pursuant to the authority in the warrant of attorney. The judgment was confessed by attorneys *Scott* and *Booth*.

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On the one side, it is contended, that the authority in the warrant to release error is operative, as a part of the judgment, by virtue of its being in the warrant, which goes upon the record; that the failure to incorporate the release in the judgment, is simply a defective execution of a power, which the Court will aid. On the other hand, it is contended, that it is a case of failure to execute a power, and the release, not being recited in the judgment, specially, is inoperative. We shall not find it necessary to decide this point. See, however, *Miller v. Macklot*, 18 Ind. 217. *Doolittle v. Lewis et al.*, 7 John. Ch. R. 45.

As to the attorneys appearing, under a warrant, to make the confession, we think the judgment was well enough confessed by *Scott and Booth*, under the general warrant.

A part of the notes was not due. The Court found the amount, covered by all of them, but fixed the payment in installments corresponding with the amounts and times specified in the notes. This was right. The Court did not inquire whether the mortgaged premises were divisible. Under the circumstances, this was not necessary.

When the sheriff is about to sell land upon an ordinary judgment, it is the right of the execution-defendant, and perhaps of the creditor, to claim that it shall be sold in parcels, and to direct which parcel shall be first offered; and, if the land can be well sold in parcels, it is the duty of the sheriff thus to sell it; and the sale is voidable, but not void, if he does not. *Cunningham v. Cassiday*, 17 (N. Y.) Court of Apps. 276. *West et al. v. Cooper*, at this term.

“Where land was sold under execution, consisting of separate, but adjoining tracts, but the sheriff and the purchaser were ignorant of the subdivision, and the defendant failed to inform the sheriff of the fact or direct a sale by parcels; held, that the sale of the land in gross was valid.” *Smith v. Randall*, 6 Cal. 47, also *Coxe v. Halstead*, 1 Green’s Ch. 311 and *Penn v. Craig*, *Id.* 495.

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So, on the foreclosure of a mortgage, where the whole amount is due, the Court, in rendering the original judgment, has nothing to do with the question of divisibility of the mortgaged premises; that is a matter for the sheriff and those interested in the property. But where a part only of the amount secured by a mortgage is due, and a sale is to be had to make that part, the Court should inquire, unless such inquiry is waived, as to the divisibility of the property mortgaged, in order that the security for the whole may not be consumed upon a sale for a part. In this case, the warrant of attorney for the confession of judgment contained this clause: "And in the final judgment herein, the Court shall decide upon what subsequent default execution shall issue herein to collect the balance, in case the defendants shall pay the amount [installment] due, before the sale of the premises; and that, in case of sale, the whole of the plaintiff's debt and costs be paid; and the residue, if any, be paid to defendants; and that they (that is the defendants) fix what parts, if the same be susceptible of division, be first sold." This stipulation places the judgment in question upon the footing of one where the installments are all due and the sale upon it is to make the entire amount, and the parties interested in the property to be sold are to determine, with the sheriff, upon its divisibility.

The debt which the mortgage was executed to secure, was, it is said, for the purchase money of the land mortgaged. The lien for that purchase money was paramount to the title of the wife by virtue of the marriage. Ind. Dig., p. 402. The Court, in rendering judgment, proceeded to ascertain the amount secured by the notes and mortgage, and which it adjudged *William Patton* personally liable to pay. It then proceeded to decree a sale of the mortgaged premises, and a foreclosure of the right of the husband and wife in the property, if they, or one of them, did not pay the debt. This was right. The wife had a right to redeem. The

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Court then ordered that, in case of sale, and failure to realize the entire amount, the deficiency should be collected by sale of other property of the defendants.

This, as the whole face of the judgment showed, was a clerical error, which would have been, at once, corrected on motion. The order should have been against the defendant, *William*, alone. But this was matter of form, as the judgment showed enough on its face to make the correction by, and did not render a suit for review necessary. Notes to 2d G. & H., p. 280.

It is objected, that the wife could not make a power of attorney. It is replied, that it is not necessary to inquire as to that, in this case; that it was only necessary here that the instrument executed should operate as notice to her of the suit, and make her a nominal party to it; that it had that effect, especially as she appeared separately, at the court-house, and acknowledged before the clerk the execution of the warrant, for the purpose of foreclosure, etc., at, etc., in, etc.

In our opinion, the wife was no party to the suit. She was not competent to bind herself by simply signing the power of attorney. Her acknowledgment of it before the clerk was authorized by no statute of which we have any knowledge; and it is not shown that she appeared personally in Court to waive process.

It is, indeed, an elementary principle of the common law, "that a married woman has no power to bind herself by contract, or to acquire to herself and for her exclusive benefit, any right by a contract made with her." *Smith v. Bird*, 8 Allen's (Mass.) Rep. 34.

But even were she held to have been a party, the decree against her upon her confession, without proof, was erroneous. *Comly and Wife v. Hendricks*, 8 Blackf. 189. *Work v. Doyle*, 8 Ind. 436. The suit for review should have been sustained as to her.

Hess and Others *v.* Hess' Administrator.

The judgment below is reversed, with costs, and the cause remanded with instructions accordingly.

R. W. Thompson and J. P. Baird, for the appellants.

Ballard Smith, B. B. Moffatt, and William Mack, for the appellee.

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HESS and Others *v.* HESS' Administrator.

The administrator or executor of a deceased fraudulent assignor of choses in action, may recover such choses in action, or their value, from the fraudulent assignee, for the purpose of applying the proceeds to the payment of the debts of the assignor, but to do this, he must allege and prove that the proceeds thereof are necessary to pay said debts; and such personal representative can not recover, as aforesaid, for the purpose of distribution to the heirs of such assignor, because such assignment, although fraudulent, is good against the assignor and his heirs.

APPEAL from the *Morgan* Circuit Court.

DAVISON, J.—The appellee, as administrator of *Charles Hess*, deceased, brought an action against *Christian Hess*, *John Trucksess*, and *Christian Newcomer*, alleging, in his complaint, that the defendant, *Trucksess*, was indebted to the decedent, by four notes of five hundred dollars each, secured by mortgage on real estate; that said decedent, then in life, was largely indebted, and, with intent to defraud his creditors, assigned said mortgage and notes to the defendant, *Christian Hess*, who now holds them, and that plaintiff, as such administrator, on, etc., at, etc., demanded the aforesaid notes and mortgage of *Christian Hess*, but he refused to deliver them, etc.; that *Trucksess* had sold the mortgaged premises to the defendant, *Newcomer*, who had assumed to pay the debt, and that the outstanding claims against the

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decedent's estate amount, in the aggregate, to two thousand five hundred dollars. The relief sought is, that the transfer of the notes and mortgage be set aside, and that the defendants be required to account to the plaintiff as administrator, and pay over to him the unpaid balance, to be applied to the payment of debts, etc. Defendants demurred to the complaint; but the demurrer was overruled, and they excepted. The issues were submitted to a jury, who found for the plaintiff. Motion for a new trial denied, and judgment, etc.

The complaint is said to be defective, because it fails to allege a want of assets in the hands of the administrator, sufficient to pay the outstanding claims against the estate. Is this position correct? An assignment of property, though it be fraudulent, is good against the assignor and his heirs; hence the administrator would have no right, in this instance, to recover for the purpose of distribution, to the heirs of the decedent, under the intestate law. So far, however, as he represents the rights of creditors, he can, in a proper case, maintain an action against such fraudulent assignee; but to do this, he must allege and prove a necessity for the proceeding. If the assets in his hands are sufficient to satisfy the creditors, such assignment must be deemed valid, because it is invalid, only, as against creditors. *Law v. Smith*, 4 Ind. 56. For aught that appears in the complaint before us, the assets in the hands of the administrator, are, in point of amount, equal to the claims against the estate, and the result is, the ruling upon the demurrer was incorrect.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

J. E. McDonald and A. L. Roache, for the appellants.
Harrison and Nave, for the appellees.

Tinkler and Others *v.* Palin.

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On the calling of a cause, the defendant filed a general denial, putting the case at issue, but then had leave of the Court to file additional paragraphs of his answer, on or before the next calling of the cause, and on such calling, no additional paragraphs were filed, but on the next day of the term, the defendant asked leave to file such paragraphs, which was refused.

Held, that such refusal was not an abuse of the discretionary power of the Court.

APPEAL from the Tippecanoe Circuit Court.

DAVISON, J.—This was an action by the appellee, who was the plaintiff, against *Consider, Joseph*, and *Myron Tinkler*, upon a promissory note for the payment of one thousand dollars. The note bears date November 21, 1860, and was payable one day after date. Defendants answered by a general denial. The Court tried the issues and found for the defendants. Final judgment was accordingly rendered, etc.

A bill of exceptions states thus: "This cause was set for trial on the fifteenth day of the April term, 1861. On the second day of that term, a rule for an answer on the seventh day was entered, and on the seventh a general denial was filed as the answer; also, on that day, an order was made that defendants have leave to file additional paragraphs of said answer, on or before the next calling of the cause. On the thirteenth day of the term, the plaintiff's attorney moved to have the defendants called, and defaulted, for want of an answer, but was informed by the Court that a default could not be entered, because there was then an answer on file, and no entry of any kind was then made in the cause. And, on the fourteenth day of the term, upon the calling for motions, and at the proper time, under the rules and practice of the Court, for filing answers, the defendants' attorneys

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produced, and offered to file, an additional paragraph to their answer, as follows:

“2. Defendants, for further answer, say, that *Consider Tinkler*, one of the defendants, at the date of the note, was the owner in fee of a tract of land, which he, orally, agreed with the plaintiff to sell to him for two thousand three hundred and forty-nine dollars, of which one thousand dollars was to be paid in cash, and the residue secured by a note and mortgage thereafter to be made by the plaintiff; that the plaintiff went to the warehouse of the defendants and paid the one thousand dollars cash payment on the land, and *Myron W. Tinkler*, as agent of *Consider Tinkler*, supposing that all the plaintiff desired was an evidence of the payment of the one thousand dollars, made the note in suit, intending it only as a receipt, which the defendants ask to be reformed and adjudged to be a receipt. It is averred, that *Consider Tinkler* has ever been ready and willing, and still is ready, etc., and offers to convey said land to the plaintiff in satisfaction of the note. Wherefore, etc. The offer to file this paragraph, though the case was not called for trial, was resisted by the plaintiff, and refused by the Court, and the defendant excepted.” Was this ruling correct?

As has been seen, the defendant, on the seventh day of the term, filed the general denial. The cause was then at issue; but the Court, on that day, ordered that he “have leave to file additional paragraphs to his answer, on or before the next calling of the cause.” The case was called on the thirteenth day of the term, but no additional paragraphs were then filed. This call, it appears, was made for the purpose of taking a default against the defendant, which, the general denial having been pleaded, could not be done; still the cause was called; and that call was, it seems to us, “the next calling of the cause,” within the meaning of the order. It follows, the defendants, after the calling thus made, were not entitled to further leave to file additional paragraphs.

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And that being the case, the refusal of the Court, on the fourteenth day of the term, to allow the additional pleading to be filed, was not, in our opinion, an abuse of its discretionary power.

Per Curiam.—The judgment is affirmed, with five per cent. damages and costs.

H. W. Chase and J. A. Wilstach, for the appellants.

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WERT v. THE CRAWFORDSVILLE AND ALAMO TURNPIKE COMPANY.

As to what will constitute sufficient articles of association for the formation of a corporation, the reader is referred to the opinion at length.

In cases where, under the general traverse, a corporation-plaintiff is not bound to prove her incorporation, *nul til corporation* is a good defense; but where the corporation is bound to allege, and, if denied, to prove, that the requisite steps, under the statute, have been taken, to constitute a valid corporation, *nul til corporation* amounts merely to the general denial, and, the latter being also pleaded, the former may be stricken out on motion.

Where the contract sued on is one made with an existing corporation, the general traverse would be an admission of the existence of the corporation, but where the contract is made with a view to the organization of a corporate body, the defendant will not be liable, unless the corporation proves, at least, a substantial compliance with all the requirements of the law necessary to constitute such a body.

Where, to an action on a subscription to the capital stock of a corporation, made while the corporation was in progress of organization, the subscriber pleads in bar, that he was illiterate; could not read; did not hear the articles of association read; but was induced to subscribe by a party interested in obtaining the subscription,

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who falsely represented to him, that, in case he' subscribed, he would not, according to the conditions of said articles, be required to pay for his stock, until the amount of twenty thousand dollars was subscribed; and that said sum never was subscribed; such facts constitute a good defense to the action.

APPEAL from the *Montgomery* Circuit Court.

DAVISON, J.—The appellees, who were the plaintiffs, sued *Wert*, upon a subscription of stock to their original articles of association. These articles are set out in the complaint, and read thus:

“We, the undersigned, do mutually covenant and agree with each other, that we will construct a gravel turnpike road from the town of *Crawfordsville*, in *Montgomery* county, *Indiana*, to the town of *Alamo*, in said county; that the route of the proposed road shall be located as follows, viz.: Beginning in the center of the *Terre Haute State road*, at the point at which the same intersects the incorporated limits of *Crawfordsville*, and running thence upon the present track of said *Terre Haute State road*, to the point at which said road is intersected by the north line of the land and farm now owned by *Richard F. Wilhite*; thence westward, along a county road, until the same intersects a county road known as ‘*The Conner’s Mill Road*;’ thence, on the nearest and best route, to the mills of *Craig & Vance*, on *Sugar creek*; thence, on the nearest and best route, to *Alamo*; that the route of the proposed turnpike is twelve miles in length, and that, in the construction and management of said turnpike road, we will adopt and use the name, style, and description of ‘*The Crawfordsville and Alamo Turnpike Company*;’ and will claim the right to sue and be sued, to plead and be impleaded, by that name and style; that, in such construction and management, we will employ a capital stock of twenty thousand dollars, divided into eight hundred shares of twenty-five dollars each, and we agree that we will

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pay to such treasurer as shall be duly appointed by said company, twenty-five dollars for each share of stock hereafter subscribed by us to these articles of association, payable at such times, and in such proportions, as may be required by the directors of said company.

Stockholders Names.	Residence.	No. of Shares.
“DAVID WERT,	Montgomery county,	Eight.”

It is averred that, on the 21st of April, 1860, a copy of said articles of association was duly filed in the recorder's office of said county; that at the time of the filing thereof, the subscriptions to the capital stock of the company amounted to more than five hundred dollars for each mile of the road, *viz.*: to the amount of thirteen thousand seven hundred dollars; and that afterward, on the 6th of July, 1861, due notice having been given, etc., the company met, etc., and elected the following board of directors, *viz.*: *Samuel Gilleland, John Blair, Charles Allen, Samuel Galey, and Pascal Wilhite*; that the board thus elected, at a regular meeting, held on the 9th of July, 1861, ordered that an installment of ten dollars on each share of the stock of the company be called for, and made payable on the 10th of August, 1861; and that the same board, at a regular meeting, held on the 23d of July, 1861, ordered that a second installment of ten dollars on each share of stock be called for, and made payable on the 26th of August, 1861, and of these assessments due notice was given, etc. It is further averred, that the defendant took and subscribed the aforesaid eight shares of stock, amounting, in the aggregate, to two hundred dollars, as one of the original corporators, for the purpose of organizing the corporation, and executing its design as set forth in the articles of association, and that he, defendant, has failed and refused to pay said installments, or either of them, etc., wherefore, etc.

Defendant demurred to the complaint; but his demurrer was overruled, and he excepted.

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Against this ruling it is insisted that the instrument in writing, set forth in the complaint, and relied on as articles of association, is not sufficient to warrant the formation of a corporation. We think otherwise. The statute authorizing the construction of McAdamized, or gravel roads, etc., provides, sec. 1, "That any number of persons may form themselves into a corporation for the purpose of constructing such road, by complying with the following requirements: "they shall unite in articles of association, setting forth the name they assume; the line of the route; and the place, to and from which, it is proposed to construct the road; the amount of capital stock; and the number of shares into which it is to be divided; the names and places of residence of the subscribers; and the amount taken by each, shall be subscribed to said articles of association." 1 R. S., p. 394. Upon reference to the instrument sued on, it will, it seems to us, at once be seen, that that instrument possesses all the essential requirements of the statute, and must, therefore, be held sufficient as articles of association.

The defendant's answer contains a general denial, and four special paragraphs. Issues were made on the third and fifth, and to the second and fourth demurrers were sustained. The Court tried the issues, and found for the plaintiffs, and having refused a new trial, rendered judgment, etc.

The action of the Court, in sustaining the demurrers to the second and fourth paragraphs, is assigned as error. The second paragraph alleges, "There never was any such corporation as the plaintiff;" and the fourth sets up these facts: One *Robert Craig*, who was a subscriber to said articles of association, and who was the owner of a mill on *Sugar creek*, and was interested in getting a turnpike to his mill, induced the defendant to subscribe to said articles, by falsely, etc., representing to the defendant that, by the articles, the work on said road should not be commenced or prosecuted, nor would he have any money to pay, until there was subscribed

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to the articles twenty thousand dollars; and the defendant avers that, though the work on said road has been commenced, and is progressing, the amount of twenty thousand dollars has not been subscribed; that the defendant could not read, nor did he hear said articles read; but relied entirely upon *Craig's* representations as to the contents thereof; and he represented that the above conditions were in the articles, etc., wherefore, etc. In reference to the second paragraph it may be assumed that, in cases where, under the general traverse, a corporation-plaintiff is not bound to prove her incorporation, *nul tiel corporation* is a good defense. But where, as in the case at bar, the plaintiff is bound to allege, and the general denial being pleaded, must prove that the requisite steps, under the statute, to constitute a valid corporation, have been taken and pursued, the defense in question amounts to the general denial, and might have been stricken out, on motion. It would be otherwise, if this was a suit upon a contract, executed to an existing corporation, because, then, the general traverse would be an admission of the corporate existence of the plaintiff. But here, the contract of subscription was made with a view to the organization of a corporate body, and the defendant is clearly not liable, unless the plaintiff has proved, at least, a substantial compliance with all the requirements of the statute necessary to constitute such body; and this being the case the general traverse put the existence of the corporation directly in issue. The result is, *nul tiel corporation* was not well pleaded. It is true, the proper mode of disposing of that defense would have been by motion to strike it out; but the same purpose having been attained by demurrer, we are not inclined to adjudge the decision erroneous. *Westcott v. Brown*, 13 Ind. 83.

The remaining inquiry is, Whether the fourth paragraph constituted a valid defense? As we have seen, the defendant was illiterate, could not read; nor did he hear the articles

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of association read; but was induced to subscribe, by a party interested in obtaining subscriptions, who falsely represented to him, that, in case he subscribed, he would not, according to the conditions of said articles, be required to pay for his stock until the amount of twenty thousand dollars was subscribed. These are, in substance, the averments of the paragraph, and, it seems to us, they are sufficient to bar the action. The representations, thus made, were not mere opinions; but referred to a material fact, as to the contents of the articles of association; and, as they were made by a person interested in creating the corporation, and who was a party to the articles, it can not be said that they were representations upon which the defendant had no right to rely. The demurrer to this paragraph should have been overruled.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

S. C. Willson and James Wilson, for the appellant.

A. Thomson, B. F. Ristine, and John M. Butler, for the appellee.

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WALKER and Others *v.* THE OCEAN BANK.

Suit on a promissory note. The complaint averred, in the first paragraph, that the note was made by A, payable to B, at the *Ocean Bank*, and B indorsed it to C, who indorsed it to D, who indorsed it to said bank; and at maturity, it was duly presented at the place, etc., and payment demanded and refused, of which the defendants had notice, and that the law of *New York* provides, that, "all notes in writing, made and signed by any person, whereby he shall promise to pay to any other person, or his order, or to the order of any other person, or unto the bearer, any sum of money therein mentioned, shall be due and payable as therein expressed, and shall have the same effect, and be negotiable in

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like manner, as inland bills of exchange, according to the custom of merchants. The second paragraph averred that the note was made by A, payable to B, at the same place, and that B, C, and D, then indorsed it, and delivered it to A, to be by him negotiated at said bank, at, etc., and that A on, etc., at said bank, etc., did negotiate, sell, and deliver the same to said bank, and also averred presentation, non-payment, notice, etc. The defendants, in their second defense, averred, that said notes are one and the same, and that the defendants were all residents of *Laporte* county, *Indiana*, and the note was made and indorsed there, and that, "by said indorsement, the defendants meant and intended to become bound only as indorsers, and not as makers of said note;" and when it became due, A had property sufficient, and was able to pay the same, but the plaintiff, "took no steps to collect the same from him, until December, 9, 1859, and they have not yet exhausted their remedy against him." The third defense was usury. Demurrs to the second and third paragraphs of the answer were sustained.

Held, that the second paragraph of the answer presents a good defense to the first paragraph of the complaint.

Held, also, that both paragraphs of the complaint were subject to demurrer, and that, therefore, the demurrer to the answer would reach back to, and embrace them, and should have been sustained.

APPEAL from the *Laporte* Common Pleas.

HANNA, J.—Suit on a promissory note.

Answer. 1. Denial. 2. That defendants were indorsers, and want of diligence, etc. 3. Usury. Demurrer to the second and third paragraphs of the answer sustained. Trial, finding, and judgment, for the plaintiffs.

The questions presented to us arise upon the rulings on the demurrs.

In the first paragraph of the complaint, it is averred, that the note was made by *Rose*, payable to *Walker*, at said *Ocean Bank*; that *Walker* indorsed it to *Organ*, who indorsed it to *Early*, and he to said bank; and that, at maturity, it was duly presented at the place where it was payable, payment

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demanded and refused, of which the defendants had notice. And further, that, in *New York*, there is a statute as follows: "Sec. 1. All notes in writing, made and signed by any person, whereby he shall promise to pay to any other person, or his order, or to the order of any other person, or unto the bearer, any sum of money therein mentioned, shall be due and payable as therein expressed, and shall have the same effect, and be negotiable in like manner, as inland bills of exchange, according to the custom of merchants."

The second paragraph avers, that the note was made by *Rose*, payable to the same person and at the same place set forth in the first; that *Walker*, *Organ*, and *Early* then indorsed it, and delivered it to *Rose*, to be by him negotiated at said bank at, etc., and that said *Rose* on, etc., at said bank, etc., did negotiate, sell and deliver the same to said bank. Averment of presentation, non-payment and notice, etc.

The defendants answered, in the second paragraph, that said notes are one and the same; that said *Rose* and defendants were all residents of *Laporte* county, *Indiana*, and said note was made and indorsed there, and "that by said indorsements said defendants meant and intended to become bound only as indorsers, and not as makers of said note;" that when it became due, *Rose* had property sufficient, and was able to pay the same, but that plaintiff "took no steps to collect the same from said *Rose* until the 9th day of December, 1859, nor have they exhausted their remedy against said *Rose*," etc.

Third, this is an answer setting up usury, and specifically setting out facts, which, in view of the conclusion we have arrived at, it is not necessary to further notice.

Each paragraph of the answer is to the whole complaint. The second paragraph presents a good defense to the first paragraph of the complaint. Indeed, under the rulings in *Hunt v. Standart*, 15 Ind. 83, and *Rose v. President*, etc., *Id.* 292, the first paragraph of said complaint was subject

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to demurrer, and therefore the demurrer to the answer would reach back and settle upon it, unless it is prevented from doing so by said answer being faulty as to the second paragraph of the complaint; which we had as well, therefore, examine now.

It is said that a promissory note has no legal inception, until it is delivered to some person, as evidence of a subsisting debt. *Catlin v. Gunter*, 1 Kernan, 368. *Marvin v. McCullum*, 20 John R. 288. *Powell v. Waters*, 8 Cowen's R. 669. *Hyde v. Goodenow*, 3 Comst. 266. And further, that until an accommodation bill or note has been negotiated, there is no contract which can be enforced on such note; the contract, either express or implied, that the party accommodated will indemnify the other, is, till then, conditional. 2 Man. & Gr. 911.

In view of these authorities, and the allegation in the second paragraph of the complaint, the question presents itself as to the meaning of the term *negotiate*, or, as averred, "to be by him negotiated at, and to, the said Ocean Bank."

The word "negotiation," as used by writers upon mercantile law, means, the act by which a bill of exchange or promissory note is put into circulation, by being passed by one of the original parties to another person. "Negotiable" means that which is capable of being transferred by assignment; a thing which may be transferred by a sale and indorsement or delivery. This negotiable quality transfers the debt from the party to whom it was originally owing to the holder, when the instrument is properly indorsed, so as to enable the latter to sue in his own name, either the maker of a promissory note, or the acceptor of a bill of exchange, and the other parties to such instruments, such as the drawer of a bill, or the indorser of a bill or note, unless the holder has been guilty of laches in giving the required notice. It must, however, be payable to order, or bearer, and, at all events, in money only, and not out of any particular fund.

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1 Cowen, 691. 6 *Id.* 108. 2 Wharton, 233. 3 J. J. Marsh, 174. 7 Taunt. 265. 3 B. and C. 47. 3 Kent Com., L. 44. 19 John. 144. 4 Blackf. 47.

In the case at bar, it appears, the note was made by *Rose* to *Walker*, by the latter indorsed to *Organ*, and by him to *Early*, who also indorsed it. Thus far, there is nothing showing but that the note was, in good faith, intended as evidence, etc., of a debt due from *Rose* to *Walker*; but after thus showing the indorsements, it is averred that, being so indorsed, said note was delivered to *Rose*, to be by him negotiated, etc. Now, can we say that the pleading is sufficiently certain in disclosing the character in which *Rose* was to act, and the title by which he then held the note? Can we say, by a just construction of this pleading, that the note was accommodation paper only, and that it was not evidence of a subsisting debt between the original parties thereto? If the words, "to be negotiated," imply only a negotiation for discount, or a putting in circulation, solely by way of a discount, of said paper, or loan obtained thereon, then the pleading is good. But if, in point of fact, the terms used would as well include a power given, by the last indorser, to *Rose*, to negotiate the said note, by a sale thereof, then the pleading is not good.

The decisions first above quoted, although made with reference to usury questions, would seem to fully sustain the propositions to which they are cited; but in the pleadings therein, the facts were clearly set forth, showing that the paper was not evidence of a subsisting debt until delivered to the person from whom a loan was obtained. In the case at bar, such indebtedness, between the original parties to the note, is not negatived. Can we say, that, in the absence of such direct averment, facts are pleaded showing such to be the truth of the case? Looking at the note and indorsements alone, the right of *Early* to maintain an action upon said note, etc., if it had been then due, would, at the time

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it was delivered to *Rose*, *prima facie*, exist; *Munn v. The Com. Co.*, 15 John. R. 55. *Davis et al. v. Clemson*, 6 McLean. 627; therefore, the power of transfer, by sale, would remain as a consequence. To show that such power did not exist, and was not exercised, the averment was inserted that, after the indorsements, the note was delivered to *Rose* to be negotiated. But could not *Rose* be the agent of the last indorser, to negotiate a sale of the note, as well as to act for himself in negotiating a loan upon paper thus got up for his accommodation? The title to the paper, as held by the *Ocean Bank*, was derived from the indorsement of *Early*. If *Rose* could thus act as agent, it was the duty of the bank to inquire in what capacity he did act, in making a delivery of the note to said bank, whether for himself, in effecting a loan upon said paper, or for others, in making a sale thereof. The bank having possessed itself of this information, it appears to us we should likewise be put in possession of it, in the pleadings, which attempt to show that the persons who signed and indorsed this paper, were to be governed by the laws of a State, other than that where such indorsements were made. Perhaps it might have been, *prima facie*, presumed by the bank that the paper offered by *Rose*, he being the maker thereof, was accommodation paper, if he had so offered it for discount, to obtain a loan upon it for his own use. *Powell v. Waters*, 8 Cowen, 689. But it is averred, in the same paragraph of the complaint, as a conclusion or result of this power to negotiate, that *Rose* "negotiated, sold, and delivered the said note to the said *Ocean Bank*," not that he procured it to be discounted. The distinction is important. If *Rose* could sell the note, and did in fact sell it, at a rate greater than seven per cent. interest, the contract would be valid; but if the note had no legal existence, as the evidence of a subsisting debt, until it was delivered to some person who loaned money upon it, then a delivery of this inchoate paper to the bank, upon an

Tucker *v.* White and Others.

agreement to reserve a sum greater than seven per cent., would render it void under the statute quoted in the paragraph of the answer setting up usury; and hence, the dignity of the averment that it was negotiated by a sale to the bank. If it had been accommodation paper, *Rose*, as an original party, could have procured its discount upon its delivery; but could not have sold it to avoid the statute of usury. It is manifest, then, that the averment of the manner in which he passed it off, shows that the paper had a legal existence, in his hands, when offered to the bank. This being the conclusion, it follows that the second paragraph of the complaint was bad, and the demurrer filed to the answer should have been sustained to the whole complaint.

If, in point of fact, the paper had a legal inception at the time it was given to *Rose* to be negotiated, then no question of usury can arise, for he could sell it at any rate in the market, if it was a sale in good faith. This is assuming that he could act as the agent of the legal owner, *Early*, in negotiating a sale and delivery of said note, upon the indorsement of said *Early*. To this we see no objection.

Per Curiam.—The judgment is reversed with costs. Cause remanded.

James Bradley and D. J. Woodward, for the appellants.

W. C. Hanna, for the appellee.

TUCKER *v.* WHITE and Others.

To determine the time when, after the stay of a judgment, an execution may issue, the day on which the replevin bail is entered should be counted.

APPEAL from the *Hamilton* Circuit Court.

Tucker *v.* White and Others.

PERKINS, J.—This was an action to recover possession of real property. To show title under a sheriff's sale, the plaintiff, among other items of evidence, offered an execution issued on the 20th of September, upon a judgment entered upon the records of the Court, which records, it is not denied in the briefs, were signed on the 24th of March. Replevin bail had been entered for the stay of execution upon the judgment for one hundred and eighty days "from the time of signing the judgment." 2 G. & H., p. 233. The execution was objected to, as having been prematurely issued, and as being, consequently, void, and the Court sustained the objection. Whether the objection would have been valid, had it been true in point of fact, we need not decide, as it was not true in point of fact.

The judgment was signed on the 24th of March, and execution could have issued upon it on that day, had it not been stayed by bail. The 24th of March, then, is one of the one hundred and eighty days for which execution was stayed.

Execution was stayed then:

In March,	-	-	-	-	8 days.
In April,	-	-	-	-	30 days.
In May,	-	-	-	-	31 days.
In June,	-	-	-	-	30 days.
In July,	-	-	-	-	31 days.
In August,	-	-	-	-	31 days.

Making	-	-	-	161 days.
It requires in September,	-	-	-	19 days,

To make the - - - 180 days.

The statute says, that "at the expiration of the stay, it shall be the duty of the clerk to issue," etc. 2 G. & H., p. 236.

This is not a case where the statute requires an act to be done, like the granting of a new trial, for example, within

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a given number of days. 2 G. & H. 332. The question in the case at bar is, when did one hundred and eighty days from an act done, viz.: "the signing of the judgment," expire.

Per Curiam.—The judgment below is reversed, with costs. Cause remanded for a new trial.

J. E. McDonald, A. L. Roache, D. Moss, and Joseph A. Lewis, for the appellant.

S. Major, for the appellee.

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DISHON and Others v. THE STATE, on the Relation of McCracken, Trustee, etc.

In actions upon the official bonds of township trustees, for failing to pay over to their successors in office the money of the township in their hands, the State, on the relation of the person who is trustee at the time suit is begun, is the proper party plaintiff.

APPEAL from the *Orange* Common Pleas.

HANNA, J.—Suit against *Dishon*, a former trustee of the township, and his sureties, on his official bond. Alleged breach, a failure to pay to his successor, the relator, certain moneys alleged to be in his hands.

Demurrer, assigning, 1. That there was not a proper party plaintiff, nor any proper relator. 2. That it does not state facts, etc. This was overruled.

Is there a proper party plaintiff?

The trustee is the treasurer of the township. Acts 1859, p. 222. He receives and disburses the moneys of the township, and, at the expiration of his term of service it is made his duty (*Id.*, sec. 12) to pay over to his successor all moneys in his hands, belonging to his township. If he fails

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to do so, we suppose that his successor can cause suit to be instituted in the name of the State, on his relation, because the official bond is payable to the State. *The State v. Votaw*, 8 Blackf. 4.

It is urged, that no suit could be brought against a trustee, without an order, to that effect, by the board of county commissioners. We are referred to p. 70, sec. 7, Acts 1841. We do not think this statute applies. It has reference specially to school funds, acts in regard thereto, and special orders that may be made, upon examinations therein provided for. It is shown in this complaint that the alleged defalcation had occurred because of a failure on the part of the outgoing trustee to settle with, and pay over to the incoming trustee, as required by law. This was a general breach of his official bond, upon which it became the duty of his successor to seek to save the funds, and protect the interests of the people of the township.

Per Curiam.—The judgment is affirmed, with five per cent. damages and costs.

A. J. Simpson, for the appellants.

M. S. Mavity, for the appellee.

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SMITH and Others *v.* ROSENHAM and Others.

A party to an action, who has complied with an order to answer interrogatories, may also be compelled to appear and testify as a witness, at the instance of the party propounding the interrogatories.

APPEAL from the *Floyd* Common Pleas.

PERKINS, J.—*Smith and Winchester* sued *Rosenham and Bamberger*. With their complaint, the plaintiffs filed interrogatories, to be answered by the defendants. The interrog-

Smith and Others v. Rosenham and Others.

stories were answered. Subsequently, and some ten days before the next session of the Court, the plaintiffs caused one of the defendants to be subpoenaed to appear and testify as a witness. He failed to appear. The plaintiffs moved for an attachment against him, but the Court refused the attachment, and forced the plaintiffs to trial, on the ground that, having filed interrogatories against the defendants, they were precluded from abandoning the answer to the interrogatories, and examining the defendants on the trial as witnesses.

We do not see that the question thus raised involves any very important principle, but it should be settled, as a point of practice, upon a construction of the statute, influenced by considerations of expediency. By our statute, parties, with certain exceptions, may be voluntary witnesses; and each can compel the opposite party to be a witness, by giving his deposition, or his testimony orally, on the trial, as the case may be. So far, parties may be treated as other witnesses. In addition, parties may be required to answer interrogatories, which answers, the opposite party may use or reject at his pleasure.

It is always the most satisfactory to courts and juries to hear the statements of the witnesses orally given upon the trial. Hence, if the deposition of a witness is taken, *de bene esse*, still it is not used if the personal attendance of the witness can be had. The party, himself, ought not to complain; and we can easily perceive that, after interrogatories have been answered, the case may present an aspect which will render it important to a full investigation of the cause, that the party who may have answered the interrogatories, should be personally examined on the trial. Such a practice is consistent with the language of the statute. 2 G. & H., p. 188.

Per Curiam.—The judgment below is reversed, with costs, and the cause remanded for a new trial.

The State ex rel. Lipperd, Administrator, etc., v. Carrington and Others.

John H. Stotsenburg and Thomas M. Brown, for the appellants.

Randall Crawford and Henry Crawford, for the appellees.

BRADY v. MURPHY.

Where the judgment of a court is the foundation of an action, or defense, the record of such judgment, or a transcript thereof, must be made a part of the complaint.

The defense of *former recovery* can not be given in evidence under the general issue.

APPEAL from the Marion Common Pleas.

Per Curiam.—It is the settled rule of pleading, in this state, that where a party makes the judgment of a court the foundation of his action or defense, he must make the record of such judgment, or a transcript of it, a part of the pleading setting it up, as in case of written instruments.

Former recovery can not be given in evidence under the general denial.

Per Curiam.—The judgment is reversed, with costs. Cause remanded for another trial.

R. L. and T. D. Walpole, and R. B. Duncan, for the appellant.

J. A. Beal, for the appellee.

THE STATE *ex rel.* LIPPERD, Administrator, etc., *v.* CARRINGTON and Others.

Where a cause, by agreement, is referred to a commissioner to take

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accounts, without an answer having been filed to the complaint, the consent cures the error.

APPEAL from the *Ripley* Common Pleas.

PERKINS, J.—Suit for review. Judgment for defendants.

The error alleged to appear of record, is the reference of a cause, by agreement of parties, to a commissioner, to take accounts, without an answer having been filed to the complaint.

We think consent cured the error. The error alleged to exist in the report of the commissioner, if, indeed, it did exist, was left uncorrected, by the inexcusable negligence of the party concerned.

Per Curiam.—The judgment is affirmed, with costs.

E. P. Ferris, for the appellant.

HARBAUGH v. MENDENHALL.

APPEAL from the *Hamilton* Circuit Court.

Per Curiam.—The judgment in this case is affirmed, with five per cent. damages and costs, on the authority of *Ellis v. Miller*, 9 Ind. 210.

D. C. Chipman, for the appellant.

E. S. Stone, for the appellee.

DAGGY and Another v. COATS and Others.

Where, in an application for a change or location of a public highway, before the board of commissioners of the county, the final order of the board, directing the change, is defective for uncer-

19	250
194	24
196	256
188	457
196	259
197	298
19b	250
143	147
19b	259
144	79
19b	259
155	654
155	655
19	250
Case 2	
168	286

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tainty, such defect may be remedied by a motion for that purpose, but it is not a ground for the dismissal of such application.

On appeal to the Court of Common Pleas, in such cases, no new ground in favor of, or against, the proposed highway, can, as a matter of right, be there filed or urged; but the cause must be there tried on the papers on which it is tried in the Commissioner's Court, and no new viewers, or reviewers, can be applied for, or appointed, unless by mutual consent.

In such case, also, the necessary papers in the cause, such as the petitions, reports of viewers, or reviewers, remonstrances, etc., which must be before the Appellate Court, are operative to make a *prima facie* case for the party in whose favor they are, and it would be the province of the Court to decide upon their sufficiency; and if the objectors had appeared below, and made objections, and had reviewers appointed, who had reported, such report becoming a part of the original papers in the Appellate Court, the original notices required to be given of the application would be thereby admitted or waived.

In such case, on the trial in the Appellate Court, the petitions, remonstrances, reports, etc., which constitute the papers on which the cause must be tried, need not be given in evidence, but should be judicially noticed by the Court, and read or stated to the jury trying the cause.

APPEAL from the *Putnam* Common Pleas.

PERKINS, J.—*William H. Coats*, and twenty-three others, presented a petition to the board of commissioners of *Putnam* county, for “a change of the highway in *Greencastle* township, of said county, leading from *Mount Meridian* to *Greencastle*, so that said highway shall run as follows, viz.: Beginning where the said highway crosses the line dividing sections twenty-three and twenty-six, in township, etc., on the lands of, etc., and running thence west, etc., on, etc., to, etc.” Proof of notice was made.

Viewers were appointed, were qualified, discharged the duty imposed upon them, and reported that the change would be of public utility. Their report was duly filed.

Daggy and Another v. Coats and Others.

Thereupon, *Addison Daggy* and *William Daggy*, persons interested, appeared and moved that the petition be dismissed, because not sufficiently certain, etc. The motion was overruled. They then filed a remonstrance. Reviewers were then appointed, who examined the route of the proposed change, etc., and reported in its favor, and that the *Daggys* would not be injured thereby, and would be entitled to no damages on account thereof. The report was received and concurred in by the board, and the change ordered to be made. The *Daggys* appealed to the Common Pleas, and there moved to dismiss the cause, on account of the uncertainty of the final order of the commissioners, in directing the change. The motion was overruled. They then called a jury to try the cause. A jury was impaneled, but no evidence was offered by either party, and the jury, under the instructions of the Court, found for the petitioners. The Court forced the *Daggys*, the appellants, to take the opening and close in the Common Pleas.

We think the petition for the highway was sufficiently certain. *Hays v. The State*, 8 Ind. 425. We do not think uncertainty in the order describing the change to be made, was ground for dismissal of the proceedings. A motion might have been made before the commissioners for greater certainty in the order, and, it not being done there, the defect might be remedied in the final order of the Common Pleas.

The remaining question is, On whom was the burden of proof on the trial in the Common Pleas? The statute on the subject of laying out and changing highways, is found at p. 359, 1 G. & H. ed. R. S., and provides that the county commissioners may lay out or change a highway, in the county, where notice, etc., has been given, on a petition, etc., and a report in favor of the change, if no objection is made; *Id.* pp. 362, 363; and without any consideration of the question of damages. These are not given unasked, and the

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statute provides the mode in which they may be applied for, and obtained, if due; *Id.* pp. 363, 364; and, also, the mode in which the objectors may review the question of utility. *Id.* But a party interested may appeal from an order of the commissioners, to the Common Pleas. Now, let us first suppose an appeal taken from the order laying out or changing a highway, where there is no objection below, and the order of the Court is made on the report of the viewers first appointed. What may be done in the cause in the Appellate Court?

We take it, that no new ground in favor of, or against, the proposed highway, can, as matter of right, be there filed. The petition must be filed before the commissioners, and so must the report of the viewers; and, on appeal, the cause must be tried on the papers on which it is tried in the Commissioner's Court; and no new viewers or reviewers can be applied for or appointed, unless, at all events, by mutual consent. *Moore v. Smock*, 6 Ind. 392. *Kemp v. Smith*, 7 *Id.* 471. And the necessary papers of record in the cause, such as the petition, reports of viewers, remonstrances, etc., which must be before the Appellate Court, to enable it to act on the several different parts of the cause which they constitute, are operative in the Appellate Court to make a *prima facie* case, at least, for the party in whose favor they are. This is necessarily so in the reason of the thing, and is declared to be so by authority. In *Malone v. Hardesty*, it is held, that the petitioners must prove, on the trial on appeal, to make a *prima facie* case, just what they must prove before the commissioners. 1 Ind. 79. What must they prove before the commissioners? Not the truth of the report of the viewers; but that the notices, etc., required by statute, had been given, etc. In the Common Pleas, then, in case of a cause appealed, where there had been no objections raised below, these questions would be for trial by a jury, and the burden of proof would be on the petitioners,

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while the sufficiency of the papers would be decided upon by the Court. *Peabody v. Sweet*, 3 Ind. 514.

But suppose, now, an appeal in a cause where the objectors had appeared below, and had objected, under sec. 23, p. 364, 1 G. & H., on the question of utility, or remonstrated under sec. 19, p. 363, on the ground of damages, or upon both grounds, and had had reviewers appointed, who had filed reports, which became, as they necessarily would, a part of the original papers to go to the Appellate Court; in such a case the notices would be admitted or waived, and proof of them would not have to be made on a trial by jury in the Common Pleas. *Milhollin v. Thomas*, 7 Ind. 165. The question on the sufficiency of the several papers would be for the Court, and, if sufficient, they would be *prima facie* true, that is the reports; and we think the petitions, remonstrances, and reports, which, as we have seen, would constitute the papers on which the cause would be tried, need not be given in evidence. They would be before the Court, like the pleadings in a cause, would be taken notice of by the Court, and, necessarily, read or stated to the jury, in placing the cause before them.

Applying, now, these principles to the case at bar: here was a petition, and a legally sufficient report upon it, in favor of a change in a highway. Here was a remonstrance, and a report of reviewers upon it, in favor of the change, and that it would occasion no damages. These papers made a *prima facie* case, certainly, in the Common Pleas, in favor of the change without damages, and, it seems to us, threw the burden of proof upon the appellants. See *The Lake Erie, etc., Co. v. Heath*, 9 Ind. 558. Taking land for a highway, it may be here observed, is taking property for public use, and the damages must be claimed in the way prescribed by statute, if it is a reasonable one. That it is has been decided. *Dronberger v. Reed*, 11 Ind. 420. That method is to claim them below, and have them assessed by viewers or

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appraisers; and if not satisfied with that assessment, to appeal, and claim a trial by jury, if the party desires to. *The Lake Erie, etc. v. Heath, supra*, and cases cited.

Per Curiam.—The judgment below is affirmed, with costs.

Williamson and Daggy, for the appellants.

H. Secrest and H. Turman, for the appellees.

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SWIHART v. CLINE.

There is no implied denial to an answer, under the code, as there is to a reply, and a general denial filed to an answer, consisting of several paragraphs, can not be considered as a denial of a new and substantive defense afterward filed by way of additional paragraph.

The Court will not specifically enforce performance of a parol contract for the purchase of land, where the land is incumbered by a prior mortgage, notwithstanding the purchaser may have made part payment of the purchase money, and he may recover back the money so paid.

APPEAL from the *Miami* Circuit Court.

HANNA, J.—*Cline* sued *Swihart*, in two paragraphs, for money loaned, and money had and received; stating the sum, in each paragraph, at ninety-eight dollars.

Answer: 1. Denial. 2. That said sum, named in said first paragraph, was paid as a part toward the price of a piece of land, bought by plaintiff of defendant. 3. Same answer as to second paragraph. 4. Avers that said sum of money was paid on a verbal contract, by which the defendant sold to plaintiff certain lands, for the agreed price of, etc. and that the defendant tendered a deed, which the plaintiff refused to receive, whereby the defendant was damaged two hundred dollars, which he sets up by way of counter-claim, etc.

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Reply: 1. General denial. 2. A special reply as to the fourth paragraph of the answer. There was a demurrer to this paragraph of the reply, upon which the Court held the fourth paragraph of the answer bad, with reference to the statute of frauds.

The defendant, thereupon, filed two additional paragraphs to his answer, viz.: 5. Former recovery. 6. As to costs, that there had been a former suit, in which this claim should have been included. Reply to the sixth paragraph. There was no issue upon the fifth paragraph of the answer, unless the general denial, which had been previously filed, formed such issue. Trial by the Court, on a special finding of facts, as follows, as well as a general finding for the plaintiff: "The plaintiff agreed, by parol, with the defendant, that, if he would purchase of one *Neff* a certain tract of land, containing about one hundred and seventy acres, he would take a certain portion of said tract, containing about forty-eight acres, at six hundred and fifty dollars, one third in hand, the balance in one and two years.

The plaintiff paid the defendant, on or about the 1st of December, 1859, ninety-eight dollars on said contract, being the money sued for; the defendant purchased the land of *Neff*, and afterward the land the plaintiff was to have, was surveyed off to the satisfaction of both parties, and the defendant made, executed, and tendered the plaintiff a deed for the same, which he refused to accept, because there was a mortgage on said land for one thousand two hundred dollars, and refused to comply with his parol agreement, there being no memorandum of said contract in writing. About eight or nine months afterward, the defendant sold and conveyed the same land to another person.

Upon the foregoing facts, the Court finds for the plaintiff for the amount paid the defendant on said contract, with interest from the date of payment, amounting to one hundred and five dollars and four cents. Holding, first, that the

Swihart v. Cline

contract for the sale of the land, being by parol, was void, and that the defendant was bound to refund the money paid on it. And secondly, that the defendant, by conveying the land to another, acquiesced in the plaintiff's recision of the contract."

I. Was there a trial without an issue upon the fifth paragraph of the answer, and if so, what was the effect?

There is no implied denial to an answer, under our code of procedure, as there is to a reply; and the general denial filed to the first answer, consisting of several paragraphs, could not, we think, be considered or treated as being in response to a new and substantive defense afterward set up in an additional answer. That answer should have been replied to, as it set up new matter in bar.

II. Was the general judgment for the plaintiff justified by the special finding?

We think that judgment was right, under the special finding of facts, without reference to the conclusion of the Court upon the case involved, for this reason, that the plaintiff was not under any obligation, for anything that appears in the record, to take title to the land with any incumbrance thereon by way of mortgage. Even if the Court would refuse to relieve from an executed contract, where there should be such incumbrance, yet it does not follow that it would compel the performance of a contract for the conveyance of land so incumbered.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

N. Q. Ross and R. P. Effinger, for the appellant.

King and Others *v.* Brewer.

SLAUGHTER *v.* THE BANK OF THE STATE, Etc.

APPEAL from the *Morgan* Circuit Court.

Per Curiam.—In this case, the Court refused to continue the cause, to enable the defendant to obtain answer to interrogatories addressed by him to the *Bank*. It is said the Court refused the continuance on the ground that a corporation could not be compelled to answer interrogatories; but the record does not properly present that question, as the record shows no issue to which the interrogatories were applicable.

The judgment is affirmed, with two per cent. damages and costs.

W. V. Burns, for the appellant.

W. R. Harrison, for the appellee.

KING and Others *v.* BREWER.

Section 11, 2 G. & H., p. 632, does not authorize a recovery upon an appeal bond for a sum larger than the penalty named in such bond.

APPEAL from the *Fountain* Common Pleas.

PERKINS, J..—This was a suit upon an appeal bond. The appeal, upon which the bond was executed, was taken by *Mettee* from a judgment against him, by a Justice of the Peace, in a suit to recover possession of lands unlawfully detained.

The bond was in the penalty of one hundred and sixty-eight dollars. The defendants below contend that that penalty is the limit of their liability on the bond. The plaintiff below, on the appeal, recovered a judgment for

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over three hundred dollars, greatly exceeding the penalty in the appeal bond, and he claims that the obligors in the bond are liable for the full amount of the judgment, notwithstanding it exceeds the penalty of the bond. He claims this, not on general principles of law, but on the following provision of the statute:

"On the trial of any cause under this act, either before the Justice of the Peace, or on appeal, the damages for the detention of the premises shall be estimated up to the time of each trial, while damages on appeal by the defendant shall be deemed as covered by the appeal bond." 2 G. & H., p. 682, sec. 11.

In relation to mere matters of private contract, parties may fix the limit to the liability they assume; but if a statute declares that a given liability shall attach upon the performance of a certain act, the parties can not, by private arrangement, restrict that liability. If, thus, the statute says that when a party goes upon an appeal bond, in a given class of cases, he shall be liable to a certain extent, he will be liable to that extent notwithstanding any attempt on his part to lessen his liability. Does the statute declare such liability in this case? It is manifest that the damages to be recovered in a case for the detention of lands must be very uncertain, owing to the uncertainty, in our practice, as to the length of time the case may be pending before a trial can be had. Hence, it would seem almost impossible to fix a penalty in a bond properly adapted to cover such damages. Hence, there is reason for the opinion that the legislature, in this class of cases, intended that appeal bonds might be executed without penalties; and that if they were not, the penalty expressed should be an immaterial part of the obligation.

The Court below held this to have been the legislative intention; and the construction of the section of the statute above quoted, to be such as we have indicated it might be,

Kirkpatrick v. Hinkle

and gave judgment against the obligors in the bond to the full amount of the judgment for damages, recovered on the appeal.

If the Court was right in the construction of the statute, the judgment must be affirmed. If wrong, it must be reversed.

It is thought the Court was wrong and that the judgment must be reversed. See sections 9 and 10 of the statute above quoted.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

McDonald and Roache, and Joseph Ristine, for the appellants.

Charles Tyler, for the appellee.

KIRKPATRICK v. HINKLE.

The reader is referred, for the points decided herein, to the opinion at length.

APPEAL from the *Carroll* Common Pleas.

HANNA, J.—*Hinkle* complained of the appellant, averring that he, together with *Patton* and *Patton*, executed a note to *Rice*, which was assigned by said *Rice* to the plaintiff; that the plaintiff sued on the same, before a Justice of the Peace in *Cass* county, and recovered a judgment against *Pattons*, who resided there, but not against *Kirkpatrick*, he being a resident of *Carroll* county; that execution had issued, and been returned no property, etc., as to *Pattons*. A copy of the note, as well as a transcript of the said proceedings and judgment, are made parts of the complaint.

Answer in four paragraphs: 1. Want of consideration for said note. 2. That plaintiff was not the owner, nor had

Gebhart *et ux. v. Hadley.*

any interest, etc., in said note; setting out the facts relied on. 3. Setting up a former recovery on said note, based on the transcript filed by plaintiff. 4. Dures.

Demurrers were sustained to each of said paragraphs.

If the note is the foundation of this action, we think the first, second, and third paragraphs of the answer were well pleaded; although it is averred that there was no recovery against the defendant in the former suit, yet the transcript filed, and made a part of the complaint, shows a service upon all the defendants, and a judgment against all. There are no averments of fraud, etc., if any such could have been made, touching the recovery of said judgment. The simple statement in the complaint, therefore, that no judgment was recovered against the defendant in that proceeding, is thus overcome by the transcript, made a part of the complaint.

But the averment of the non-recovery of a judgment against the defendant has one effect: it shows that this suit was not intended to be upon that judgment, and consequently the ruling upon the demurrers was wrong.

The fourth paragraph is so uncertain and contradictory, as it appears in the record, that the demurrer was properly taken.

Per Curiam.—The judgment is reversed, with costs.

J. Guthrie and J. R. Flynn, for the appellant.

GEBHART *et ux. v. HADLEY.*

It is error, in an action against husband and wife to foreclose a mortgage, to render a personal judgment against the wife for any deficiency after the sale of the mortgaged property.

APPEAL from the *Parke* Circuit Court.

Randall and Others *v.* Ghent and Another.

Per Curiam.—Suit to foreclose a mortgage against husband and wife. Judgment of foreclosure and sale. It is further ordered, that if the mortgaged premises fail to sell for sufficient to pay the debt, execution issue for the deficiency against “the defendants.” It should have been against the defendant, *Lewis L. Gebhart*, and the Court is instructed to thus correct the judgment below, as it doubtless would have done, before this appeal, if it had been asked to. Attorneys should attend to the reading of the minutes of the proceedings in the Courts, so as to see that their orders and judgments are correctly entered. The judgment is affirmed, with two per cent. damages and costs, subject to the correction above ordered.

S. C. Willson, for the appellants.

Thomas N. Rice, and *McDonald and Roach*, for the appellee.

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A merely voluntary executory contract, for the conveyance of land, will not be specifically enforced; nor will a voluntary deed be corrected of mistakes, on the application of the grantee against the grantor; but it will be on the application of the grantor against the grantee, where, by mistake, the conveyance is for a larger estate than was intended.

But an executed deed, made upon no consideration, whether one be expressed or not, is valid, and operative against the grantor.

APPEAL from the *Putnam* Circuit Court.

PERKINS, J.—Suit to recover possession of real estate. Judgment below for the defendant. The facts of the case, in short, are these:

Thomas Randall, in his life time, owned the land in dispute,

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and, on the 5th of February, 1860, died in its possession. The plaintiffs in this suit are his heirs at law. These facts disclose the title upon which the plaintiffs claim the land.

Elizabeth Ghent, the defendant, was a step-daughter of *Thomas Randall*, and, on the 5th day of July, 1859, he, "in consideration of the natural love and affection he held to her, as his said daughter," conveyed to her, by a deed, drawn in the form prescribed for warranty deeds by the statute, the land involved in this suit. The deed was duly acknowledged. These facts disclose the title upon which the defendant claims the land.

The position taken by the plaintiffs is, that a deed, without consideration, when purporting to be made upon a consideration, is void; that though natural love and affection is a good consideration, recognized in the law, as between parent and child, it is not a consideration between an owner of land and a stranger; that natural love and affection, in the legal sense of the term, can not exist between strangers.

It is well settled, that a merely voluntary executory contract, for the conveyance of land, will not be specifically enforced; *Froman v. Froman*, 13 Ind. 317; nor will a voluntary deed be corrected of mistakes, on the application of the grantee against the grantor; (*Id.*) though it will be on the application of the grantor against the grantee, where, by mistake, the conveyance is for a larger estate than was intended. *Andrews v. Andrews*, 12 Ind. 348. See *Wyche v. Green*, 16 Georgia, 49. But the proposition seems to be a universal one, in this State, that an executed deed, made upon no consideration, whether one be expressed or not, is valid and operative against the grantor; and the cases of *McNeely v. Rucker*, 6 Blackford, 891; *Doe v. Hurd*, 7 *Id.* 510, and *Thompson v. Thompson*, 9 Ind. 824, decide the precise question raised in this case, and decide it against the plaintiffs.

The fact that the deed contains a warranty is unimport-

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ant, for this if for no other reason: that in a suit upon a warranty, for its breach, evidence would be heard as to the consideration paid, in determining the question of damages to be recovered. *Reese v. McQuilkin*, 7 Ind. 450.

Per Curiam.—The judgment below is affirmed, with costs. *Henry Secretst, J. A. Scott, and J. A. Matson*, for the appellants.

Williamson and Daggy, for the appellees.

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The summons is a part of the record, where there is no appearance. In rendering judgment on money demands, it is proper to render the judgment for the aggregate amount of the principal and interest due at the date of the judgment, and the same will bear interest from date.

APPEAL from the *Shelby* Common Pleas.

WORDEN, J.—Action by the appellee against the appellant. Judgment by default.

The term of Court, at which judgment was rendered, commenced on the first Monday of March, 1861. It is objected, that no term of Court could then be held, and we are referred to the act of March 1, 1859 (Acts, 1859, p. 91), fixing a different time. Five days later, an act was approved which authorized the term in question (Acts, 1859, pp. 84-6, sec. 8). It is objected, also, that the record does not show proper service of process. The record sets out the summons and the sheriffs return thereon, showing service in due time. It is insisted, however, that the summons and return thereon are no part of the record, unless embodied in and made part of the judgment. This is clearly unnecessary. The summons is a part of the record where there is no appearance. *2 R. S., 1852*, p. 159, sec. 559.

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Again, it is objected, that the judgment was for the amount due on the note for principal and interest. The point of this objection is, that as the judgment draws interest, the plaintiff is obtaining compound interest. It is suggested, that the judgment should have been for the principal of the note, and a separate order for the interest due up to the date of the judgment, to be collected without interest. The judgment, as rendered, is clearly right. An effectual method of avoiding the hardship of compounding interest, would be the payment of the judgment before interest had accrued thereon.

There is no important question in the record, except the question of time, and the judgment must be affirmed.

Per Curiam.—The judgment is affirmed, with costs, and eight per cent. damages.

M. M. Ray and B. F. Davis, for the appellant.

S. Major, for the appellee.

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ROBINSON *v.* THE STATE.

APPEAL from the Tippecanoe Common Pleas.

Per Curiam.—The judgment is reversed. The information fails to aver facts sufficient to give jurisdiction to the Common Pleas.

McDonald, Roache, and Lewis, for the appellant.

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COQUILLARD'S Administrators *v.* FRENCH.

Claims on account, held against certain *Indian* tribes, in 1847, and which were expected to be paid by the government of the *United*

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States, were assignable, in equity, so as to enable the assignee, who was the real party in interest, to maintain suits thereon in his own name.

A paragraph of an answer, which sets up in bar of an action upon an agreement, a new agreement between the parties, which does not appear to have been executed, and was a mere accord without satisfaction, is bad on demurrer.

A paragraph of an answer, which pleads no facts that can not be given in evidence under the general denial, the latter having been pleaded, should be stricken from the files on motion.

An authority "to attend to the business of the principal generally," or "to act for him with reference to all his business," does not authorize the agent to sell real estate, nor does it allow him to sell, or otherwise dispose of the personality of his principal, unless as a means, necessary and proper, to conduct the business to which the agency applies.

APPEAL from the *St. Joseph* Circuit Court.

DAVISON, J.—This was an action by *French* against *Samuel Cotterell*, administrator of *Alexis Coquillard*, deceased, commenced in the *St. Joseph* Common Pleas, and after its commencement, duly certified to the Circuit Court. The complaint contains four counts. The first is founded upon an account, setting forth the items, and amounting, in the aggregate, to five hundred and forty-four dollars and fifty-five cents. The second alleges that *Coquillard*, while in life, was indebted to the plaintiff, twenty thousand dollars, which is due, and remains unpaid. And the third count is upon a written agreement, alleged to have been executed by *Coquillard*, in his lifetime, to the plaintiff; it bears date March 8, 1847, and reads thus:

"Know all men by these presents, that I, *Alexis Coquillard*, for and in consideration of ten thousand three hundred and twelve dollars, to me in hand paid by *Ezekiel French*, the receipt whereof is hereby acknowledged, and in consideration of his having executed his promissory note to me for

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six thousand three hundred and ninety-four dollars, payable when the claims hereinafter mentioned are collected, and, furthermore, it is upon the express agreement, that *French* is to retain and have out of such claims, the first moneys after expenses of collection are paid, enough to reimburse himself the said ten thousand three hundred and twelve dollars, and the next moneys received on such claims, are to be received by me, after deducting necessary expenses of collection, enough to make up an equal sum, to-wit: Ten thousand three hundred and twelve dollars, and after that, the receipts of moneys are to be equally divided between myself and *French*. I am to pay, in the end, all expenses of collection, except traveling expenses, which are to be equally borne between myself and *French*; have bargained, sold, and do hereby assign and transfer, the one undivided half of all my right, title and interest, in and to the *Indian* claims against the *Pottawattamie*, *Ottawa*, and *Chippeway* nations of *Indians*, a schedule of which claims is hereto attached, and which claims are now on file at the proper office at the seat of government of the *United States*, and were all, except one of them, allowed by *William B. Mitchell*, commissioner on such claims, on behalf of the government, in the year 1840, and which claims I hold by transfer and powers of attorney; upon express agreement, that such sale, assignment, and transfer is made to *French*, without any recourse upon me, in any event whatever; and I do hereby nominate, authorize, and appoint *Ezekiel French*, my lawful attorney, for me, and in my name, or otherwise, to demand, collect, receive, sell, transfer, assign, or dispose of, in any manner soever, and discharge and receipt for said undivided half of said claims, to said government, or said *Indians*, entirely and perfectly, as I could do in person, were I individually and personally present at the doing thereof, at his own will and pleasure, freely; but in all and every case, without any recourse upon me, in any event whatever.

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Hereby ratifying and confirming whatsoever my said attorney shall do in the premises, I hereunto set my hand and seal, this third day of March, 1847.

"In presence of } "A. COQUILLARD, [seal.]"
 "R. L. FARNSWORTH, }
 "JOHN GRANT."

The following is a copy of the schedule of claims referred to in the above agreement, to wit: "Schedule of claims against the *Pottawattamie, Ottawa, and Chippeway* tribes of *Indians*, belonging to *Alexis Coquillard*.

"No.	2	A. T. Hatch,	-	-	-	-	\$874 58
8	Jacob Hardman, M. D. (medical services in 1840),	-	-	-	-	54 00	
13	Francis Monton,	-	-	-	-	1099 54	
14	H. H. Wheeler, for use of Mary Chapotine,	1186	13				
15	John M. Barbour,	-	-	-	-	1000 00	
20	Pierre F. Navarre,	-	-	-	-	2528 87	
17	Celeste Sharron,	-	-	-	-	1000 00	
21	Lewis St. Comb,	-	-	-	-	785 00	
22	John B. Rulo,	-	-	-	-	974 50	
24	Jane Rulo, heir of Thomas Jones,					1000 00	
26	Lambert McComb,	-	-	-	-	68 00	
37	Christian Holler,	-	-	-	-	60 00	
38	Jacob Cripe,	-	-	-	-	559 50	
39	John Cripe,	-	-	-	-	800 00	
40	Pleasant Ireland,	-	-	-	-	100 00	
42	Jonathan A. Liston, horse, saddle and bridle, 1840,	-	-	-	-	100 00	
48	Samuel Street,	-	-	-	-	71 93	
56	George Busha, boarding Indians at Coun- cil, 1840,	-	-	-	-	822 18	
57	Jonathan A. Liston,	-	-	-	-	265 00	
76	W. G. Knaggs,	-	-	-	-	70 90	
79	Charles Lucie,	-	-	-	-	71 90	

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"No.	89	Rhinehart Cripe,	-	-	-	\$570 00
90	E. V. Cecott,	-	-	-	-	100 00
140	J. A. Henricks,	-	-	-	-	150 00
143	Mary L. Chaudonai,	-	-	-	-	439 18
150	Elmer Rose, (horses, etc., in 1840),					273 00
156	John Pike,	-	-	-	-	250 00
157	E. D. Woodbridge,	-	-	-	-	250 00
159	Leonard B. Rush,	-	-	-	-	79 00
160	Samuel L. Cottrell,	-	-	-	-	415 00
161	L. M. Alverson, (goods furnished in 1840),	4379	45			
163	A. Coquillard,	-	-	-	-	270 00
193	Martin & Finley,	-	-	-	-	55 00
194	C. W. Martin,	-	-	-	-	141 00
210	William B. Mitchell, (horses, saddle, etc., in 1840),	-	-	-	-	365 25
223	Louis Cowpeau, (goods in 1840),	-				766 68
246	Francis Monton,	-	-	-	-	24 00
254	Daniel Wagner,	-	-	-	-	200 00
255	A. Coquillard, (goods, horses, saddles, etc., 1840),	-	-	-	-	3662 51
256	J. A. Liston,	-	-	-	-	500 00
76	E. Ballenger,	-	-	-	-	43 20
195	S. A. Bernier,	-	-	-	-	600 00
176	A. R. & J. H. Harper, (goods in 1840),	1090	03			
199	" " " " "	"	"	"	"	105 10
240	" " " " "	"	"	"	"	194 64
185	G. Boleiske, (medical services in 1840),					25 00
87	Rex & Willoughby, (medical services in 1840),	-	-	-	-	50 00
866	Joseph Bertrand,	-	-	-	-	5229 29
164	Elisha Egbert, (goods in 1840),	-	-	-	-	757 08"
						<hr/>
						\$33414 14

It is averred that said claims, in the aggregate, amount to thirty-three thousand four hundred and fourteen dollars

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and fourteen cents, the one-half of which, viz.: sixteen thousand seven hundred and seven dollars and seven cents, *Coquillard*, by the aforesaid agreement, sold, assigned, and transferred to the plaintiff; that, afterward, in the year 1849, the plaintiff took a journey to *California*, and did not return to *Indiana* until January the 25th, 1851; that during plaintiff's absence, *Coquillard*, by fraud and tortious means, etc., obtained, from one *Lemuel White*, the possession of the above agreement, without the authority, consent, or knowledge of the plaintiff; and that neither the decedent, nor his administrator, have ever returned it; but that he, *Coquillard*, fraudulently mutilated the same by cutting out his signature and certain words and letters therefrom; that the plaintiff has duly performed all the conditions of the agreement on his part, to be performed; but *Coquillard* failed to perform the conditions on his part; that the government of the United States paid the claims set forth in the schedule, and of the moneys thereof, *Coquillard*, in his lifetime, received twenty-five thousand dollars, after deducting and paying the expenses of collecting; and that he, in his lifetime, although requested, and said administrator, since his death, although requested, have hitherto failed and refused to pay the plaintiff the said sum of ten thousand three hundred and twelve dollars, or any part thereof; which amount is due, and as yet remains unpaid, beside seven years' interest thereon, wherefore the plaintiff demands judgment, etc.

The fourth count is founded upon the same written agreement, and alleges, substantially, the following breaches:

1. That *Coquillard*, in his lifetime, collected on the claims, in said schedule specified, twenty-six thousand five hundred and fifty-nine dollars, which, after deducting expenses of collection, amounted to more than ten thousand three hundred and twelve dollars, and which last-named sum being of the first moneys received on the claims, belonged exclusively, to the plaintiff; but the same and every part, was, and has

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been, wrongfully withheld and retained from him, by *Coquillard*, in his lifetime, and his administrator since his death. 2. That *Coquillard*, in his lifetime, collected and received into his hands, the entire amount of said claims, to-wit: thirty-three thousand four hundred and fourteen dollars and fourteen cents, and converted the same to his own use; and ever since, *Coquillard*, during his life, and said administrator since his death, have refused to account with the plaintiff, and pay over to him a moiety of said moneys, after deducting expenses of collection, etc. 3. That the entire amount of said claims, to-wit: thirty-three thousand four hundred and fourteen dollars and fourteen cents, was paid by the *United States Government*, in the Government's independent treasury drafts, payable in the city of *New York*; that these drafts were all received by *Coquillard*, in his lifetime, at *South Bend, Indiana*, and were worth at that place, when received, two per cent. above par; and that one-half the amount of said drafts, with the above premium thereon, amounting in the whole to seventeen thousand dollars, belonged to the plaintiff, there being no traveling expenses; was received by *Coquillard*, for the use of the plaintiff; was due from him, while in life, to the plaintiff; and still remains due and unpaid. 4. The same as the third, with the additional averment of a demand on *Coquillard*, in his lifetime, for one-half the amount of the drafts, with said premium thereon, and his refusal to pay, etc. 5. That *Coquillard*, on the 6th of October, 1852, being then in life, promised to pay to the plaintiff one-half the amount of the drafts, with interest thereon, but the same has not been paid. 6. That *Coquillard*, having obtained the written agreement by fraud, as aforesaid, fraudulently disposed of the plaintiff's interest in said claims, which interest was, and has been, thereby lost to the plaintiff, whereby he has been and is damaged twenty thousand dollars.

Defendant demurred to the third and fourth counts of

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the complaint, but his demurrs were overruled; and thereupon he answered by nine paragraphs: The first is upon a book account, consisting of various items of account, which, in the whole, amount to two thousand four hundred and fourteen dollars and eighty-seven cents. The second alleges, by way of set-off, a note, bearing date December 31, 1852, for three thousand two hundred and eighty-four dollars, payable in two years, with interest, upon which there is indorsed a credit, July 11, 1854, two thousand two hundred and thirty-one dollars. The third alleges, by way of set-off, a note, of the same date as above, for three thousand two hundred and ninety dollars, payable in three years, with interest. The fourth is the general denial. The fifth alleges payment. And the sixth, seventh, eighth and ninth paragraphs are thus copied, substantially, in the appellant's brief:

“ 6. The sixth paragraph set up specially, that after the execution of the agreement and schedule set forth in the complaint, *French*, in the year 1849, went to *California*, and prior to his departure, by power of attorney, constituted one *Lemuel B. White* his general agent, to transact all his (*French's*) business; and that, afterward, on the 25th day of April, 1850, the said *White*, being the duly authorized agent of *French*, sold to *Coquillard* all the claim, right, title and interest of *French*, to the *Indian* claims embraced in the schedule, for five thousand dollars, in *Illinois* State bonds, and that *White*, as agent of *French*, delivered to *Coquillard* for cancellation the original power of attorney and agreement (heretofore copied at large), and that the said agreement was thereupon canceled; that *Coquillard* executed his note to *French*, for the payment of the five thousand dollars of *Illinois* State bonds, and delivered the same to *White*, which note, defendant alleges, is still in the possession of *French*; that, afterward, on the 11th of June, 1850, *Coquillard* paid to *White* two thousand dollars in *Illinois* State bonds; that, afterward, on the return of *French* from *California*, on the

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25th day of February, 1851, he ratified and confirmed the acts of his agent, *White*, and received three thousand dollars, in *Illinois* State bonds, from *Coquillard*, in full satisfaction of the note.

"7. The seventh paragraph denies the execution of the agreement set up in the plaintiff's complaint, but admits the execution of one in every respect identical, excepting only the provision respecting the payment of the expenses of the collection of the claims, and alleges that the sale by *Coquillard* was made without any recourse upon him in any event whatever; and that at the time of the execution of the instrument, no provision or appropriation of any kind or nature whatsoever had been made by the government of the *United States* for the payment of said *Indian* claims. It further alleges the appointment of *Lemuel B. White* as agent, the re-sale of claims by *White*, as such agent, to *Coquillard*, substantially as in the sixth paragraph. It alleges also that this re-sale was made before the appropriation by government of money to pay the claims, and that *Coquillard* delivered to *White*, at the time of re-sale, the note of *French* for six thousand three hundred and ninety-four dollars and fifty-seven cents, payable when said claims were collected; that the original agreement was delivered by *White* to *Coquillard* for cancellation; that thereupon *Coquillard* cut from said instrument his signature, whereby the erasures now in the original were made; that *Coquillard* paid two thousand dollars, in *Illinois* State bonds, to *White*; that *French*, while in *California*, was informed, by his agent, of the re-sale of the claims to *Coquillard*, and ratified the acts of his agent, and upon his return again ratified the same.

"8. The eighth paragraph refers to the agreement between *White* and *Coquillard* in relation to the sale of *French*'s interest in the claims, as set forth in the fourth original paragraph of the answer, now numbered seventh in the record; and alleges, that *French* having hypothecated the *Illinois*

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State bonds taken by *White* from *Coquillard*, it was afterward, in February, 1851, agreed, between *French* and *Coquillard*, that *Coquillard* would, upon the return of the two *Illinois* State bonds of one thousand dollars each, and of the note for five thousand dollars in *Illinois* State bonds, pay to *French* five thousand dollars in money, in lieu of the bonds and note; and alleges that plaintiff still retains the possession of the bonds, and note of five thousand dollars, and also the note for six thousand three hundred and ninety-four dollars and fifty-seven cents, and has never offered to return them; and that the decedent, in his lifetime, and his administrator, since his death, have ever been ready and willing to pay said money, upon plaintiff's compliance with his agreement.

"9. The ninth paragraph alleges that the decedent never received any money or moneys upon the powers of attorney and transfers mentioned in the agreement or power of attorney executed by *Coquillard*; and that the powers of attorney and transfers made and executed by the original claimants, set forth in the power of attorney made by *Coquillard* upon the 3d day of March, 1847, were executed after the passage of the Act of Congress of July 29, 1846, and entitled 'An Act in relation to the payment of claims,' and prior to the Act of Congress of September 30, 1851, appropriating money for the payment of said *Indian* claims, and that said powers of attorney and transfers were afterward declared, by the proper officers of the government of the *United States*, void and worthless, and all acts done by virtue thereof of none effect; and that by reason of such illegality, *Coquillard* had no right, title, and interest in the claims mentioned in the complaint; and all said claims, transfers, and powers of attorney were valueless and uncollectable, and that no money was collected upon such claims, by *Coquillard*, upon such powers of attorney and transfers, but the moneys were drawn and collected from the treasury of the *United States*, some

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by sundry persons other than *Coquillard*, as attorneys of the original claimants, upon new powers of attorney, executed after the said act of appropriation was passed, and some by the claimants themselves, for their own use, and denies that *Coquillard* received any of the moneys for himself, and to his own use."

Issues were made on the first, second, third, fifth, sixth, and seventh paragraphs of the answer. To the eighth, a demurrer was sustained, and the ninth was stricken out on motion. The issues were submitted to a jury, who found, for the plaintiff, seven thousand two hundred and ninety-four dollars. Motion for a new trial denied, and judgment, etc.

Against the validity of the third and fourth counts of the complaint, it is insisted that the claims therein set forth are not assignable; that they are *chooses in action*, and the assignment of them, being against public policy, is consequently void. In support of this position, we are referred to an Act of Congress, approved July 29, 1846. But that enactment does not apply to the point under discussion, because it relates to claims against the government, while the claims in question are against the *Indians*. 9 U. S. Stat. at Large, p. 41. We know of no reason or authority why the assignment of these claims should be held illegal. They are, it is true, *chooses in action*, and may not, at common law, have been assignable, so as to enable the assignee to sue in his own name; but in equity, the assignee being the real party in interest, was the proper party to avail himself of the remedy. Van Santvoord's Pl. 108. Perkin's Pr. 181, 11 Ind. 199. 12 *Id.* 241.

The ruling upon the demurrer to the eighth defense is next to be considered. That defense, as we have seen, sets up a new agreement between *Coquillard* and *French*, after the latter returned from *California*, in discharge of a former executed agreement between *White*, as the alleged agent of

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French, and *Coquillard*; but the new agreement does not appear to have been executed; was a mere accord without satisfaction; and was not, therefore, an available bar to the action. Nor did the Court err in striking out the ninth defense; because all the facts which it contains could have been given in evidence under the general denial.

The causes for a new trial are thus assigned: "1. Error in the assessment of damages; the same being too large. 2. The verdict is unsustained by the evidence. 3. Error of the Court in instructing the jury, that, if they found for the plaintiff, they may allow interest on the ten thousand three hundred and twelve dollars, received by *Coquillard*, on the *Indian* claims, from the time the drafts came into his hands. 4. Error of law, in instructing that *French's* power of attorney to *White*, and *French's* letter to *Coquillard*, did not give *White* authority to sell said claims to *Coquillard*."

The evidence is upon the record. It tends to prove that plaintiff, after the execution of the agreement recited in the complaint, viz.: in April, 1849, went, by overland route, to *California*, and returned in January, 1851; and that, when he started for *California*, he gave to one *Lemuel B. White*, a power of attorney, in these words:

"Know all men, etc., that We, *Ezekiel French* and *Elizabeth French*, his wife, do hereby constitute and appoint *Lemuel B. White*, of *Kosciusko* county, *Indiana*, our attorney, for us, and in our names, to sell and convey, by deed in fee simple, for such price, and upon such terms of credit, and to such person, or persons, as he shall think fit, the whole, or any part, of any and all lots in the town of *Oswego*, in said county; a plat of said lots, so to be sold, is now of record in the recorder's office of the same county, as laid out by *Ezekiel French* and *Rowland Willard*; also, to lease, sell, or convey, our interest in the water-power adjoining *Oswego*; also, to lease, or sell, our house and lot in *Oswego*, and the

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lands on the west side of the river, near Oswego, and to attend to our business generally; hereby ratifying, etc., all such bargains, receipts for money, agreements, and deeds, as shall be made, executed, or acknowledged, in the premises, by our said attorney, the same as if we were personally present, and the same done by ourselves. In testimony whereof, we have hereunto set our hands and seals, at Oswego, this 2d of April, 1849.

“EZEKIEL FRENCH, [seal.]

“ELIZABETH FRENCH. [seal.]”

The foregoing warrant of attorney appears to have been duly acknowledged and duly recorded.

The evidence, also, tended to prove, that *White*, professing to act under the above instrument, on the 25th of April, 1850, and during the plaintiff's absence, sold and transferred all his, plaintiff's, interest in said *Indian* claims, to *Coquillard*, receiving therefor *Coquillard*'s promissory note for five thousand dollars, payable to the plaintiff in five one thousand dollar *Illinois* State bonds; and *White*, in pursuance of this sale, delivered up the agreement, set out in the complaint, to *Coquillard*, who cut his name from it. And further, there was in evidence, a letter to plaintiff, from *Coquillard*, dated *West Port*, May 30, 1849, in which the plaintiff says, *inter alia*, “I learn, from *G. W. Ewing*, and others, that there is a prospect of having the recent *Miami* and *Pottawattamie* claims allowed by the *Indian* department, through the influence of the Secretary of War. * * * I have not heard a word from our *Pottawattamie* claims of 1840. I suppose all is being done that can be done on part of the claimants to have them promptly and fairly attended to. As I have perfect confidence in your judgment and experience, and perseverance, I have no plan to suggest. I think the present a favorable time to push the claims. I have fully authorized *L. B. White*, of *Oswego*, to act for me, with reference to all my business. You will find him an efficient and clever fellow.

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You will correspond with him, and give him the state of things, and instruct him what to do on my part."

In reference to the power of attorney and letter, to which we have just referred, the Court thus instructed the jury: "The power of attorney, given in evidence, and the letter of *French*, dated May 30, 1849, did not, *per se*, confer upon *White* the authority to cancel and give up the agreement set out in the complaint."

Against the instruction, thus given, it is insisted, "that the terms of the letter and power of attorney, grant power unlimited, embracing the whole business of the principal, and a resort to ordinary and usual methods or means comes within the scope of the power." This proposition, as we understand it, is not strictly correct. An authority "to attend to the business of the principal, generally," or "to act for him, with reference to all his business," does not authorize the agent to sell and convey real estate; nor does it allow him to sell, or otherwise dispose of, the personality of his principal, unless as a means, necessary and proper, to conduct the business to which the agency applies. In this case, the agent was, perhaps, authorized, under the power "to attend to the business of the principal," to act in reference to the collection of the *Indian* claims from the government; but, it seems to us, he had no power, for the purpose of collection or otherwise, to sell, or transfer, his principal's title to the claims in question. Such power does not appear to have been in contemplation of the parties, when the warrant of attorney was executed; nor is it, even impliedly, within the scope of the authority conferred by the instrument creating the agency. *Story on Agency*, sec. 57, *et seq.*

The instruction was, therefore, not objectionable. But, in argument, it is said that the plaintiff, after he returned from *California*, ratified the acts of his agent, in relation to the sale of the claims to *Coquillard*, and the surrendering up to him of the agreement. That was a question for the

Coquillard's Administrator v. French.

jury. In reference to the point of fact which that question involves, the evidence is voluminous, and we are not inclined to refer to it in detail. We have, however, carefully examined all the evidence relative to that point, and, though it is to some extent conflicting, the jury, in our opinion, were authorized to say that it failed to prove the alleged ratification.

The third assigned cause for a new trial relates to the following instruction: "If you find for the plaintiff, you must find the interest on the whole amount received by *Coquillard*, even if you should find it to be the whole amount claimed, to wit: ten thousand three hundred and twelve dollars." As has been seen, the agreement set out in the complaint, stipulates that, out of the first moneys collected upon the *Indian* claims, the plaintiff was to receive the amount just stated, and the evidence very plainly shows that, of these claims, *Coquillard*, assuming that they belonged to him, exclusively, collected a large amount, over and above the amount so stipulated to be paid to the plaintiff. There is no evidence tending to prove that he ever paid, offered to pay, or intended to pay, the ten thousand three hundred and twelve dollars, or any part of it. We think the interest contemplated by the instruction was plainly allowable, and that the Court did not, therefore, misdirect the jury.

But it is argued, that the verdict is excessive; that it is unsustained by the evidence. These positions, in view of all the evidence, are untenable. It is true, there is an apparent conflict, but the verdict, it seems to us, is not manifestly wrong, either as to the plaintiff's right to recover, or as to the amount recovered. There are various assignments of error, based upon the rulings of the Court, in reference to the exclusion of evidence offered by the defendant; to the admission of testimony over his objection; and to the giving, and refusal to give, instructions to the jury. But, as these rulings were not presented to the Court in the motion for a

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new trial, the errors referring to them are not available in this Court.

A point is made by the appellant, in his brief, relative to the taxation of costs; but no motion to tax costs appears to have been made in the Circuit Court, nor is there any assignment of error in reference to such taxation. It follows, the point, thus made, is not, properly, before us.

Per Curiam.—The judgment is affirmed, with one per cent. damages and costs.

John F. Miller and William G. George, for the appellants.
J. A. Liston and R. L. Farnsworth, for the appellee.

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**THE CINCINNATI, PERU, AND CHICAGO RAILROAD COMPANY and
Others v. EMRICK.**

SAME APPELLANTS v. WHEESNER.

SAME APPELLANTS v. SMITH.

The case of *The Cincinnati, Peru, and Chicago Railroad Company and Others v. Cochran*, 17 Ind. 516, followed.

APPEALS from the Wabash Circuit Court.

Per Curiam.—These cases appear to have been instituted at the same time, and to be similar, in all respects, to that of the *same appellants v. Cochran*, 17 Ind. 516. The decision in that determines these cases. The record, in each case, is so confused, that we are not able to determine, certainly, whether the judgment is within the power of the Court, upon the record presented. It was ordered, etc., that a deed from the appellee to the railroad company, be set aside, etc., and yet, the better opinion would seem to be, from said record, that the parts of the complaint by which that end

Perdue *v.* Aldridge.

was sought, were dismissed, and a different remedy prayed for.

John W. Pettit and *Calvin Cowgill*, for the appellants in each case.

John Brownlee, for the appellee in each case.

ELLSTON and Others *v.* Scott.

APPEAL from the Carroll Common Pleas.

Per Curiam.—This case is affirmed, on the authority of *Allen et al. v. Davison*, 16 Ind. 416, and *Rosser et al. v. Barnes*, *Id.* 502. The only point raised by the appellants' counsel, is upon the interrogatories. We discover no error in the case.

Affirmed, with one per cent. damages and costs.

F. J. Mattler, for the appellants.

Huff, Jones, and Stewart, for the appellee.

PERDUE *v.* ALDRIDGE.

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A mortgage is a valid security between a mortgagor and mortgagee, without acknowledgement or record, except that, to bind a *femme covert*, it must be acknowledged by her.

In a complaint for foreclosure, by the mortgagee against the mortgagor alone, it is not necessary to aver that the mortgagor has not sold the land, or that the mortgage has been acknowledged or recorded.

Variances between instruments sued on, and those offered in evidence, where the defendant will not be prejudiced thereby, may be amended on the trial.

Timmons and Others *v.* Vancleve.

APPEAL from the *Delaware* Common Pleas.

Per Curiam.—A mortgage is a valid security between the mortgagor and mortgagee, without acknowledgment or record. Neither of these acts is necessarily a part of a mortgage, except as to a *femme covert*. 1 G. & H., p. 257, notes. She must acknowledge.

Where the suit to foreclose is by the mortgagee against the mortgagor alone, it is not necessary to aver in the complaint that the mortgagor has not conveyed away the land, or that the mortgage has been acknowledged or recorded.

Variances between instruments sued on and those offered in evidence, where the defendant will not be prejudiced thereby, may be amended on the trial. 2 G. & H., pp. 104, 114, and notes.

The judgment is affirmed, with five per cent. damages and costs.

David Nation and Thomas S. Walterhouse, for the appellant.
Walter March, for the appellee.

TIMMONS and Others *v.* VANCLEVE.**APPEAL** from the *Carroll* Common Pleas.

Per Curiam.—The bill of exceptions in this case is stricken from the record, and the judgment below affirmed, on the authority of *Peck v. Vankirk*, 15 Ind. 159, the cases being precisely alike.

The judgment is affirmed, with five per cent. damages and costs.

F. J. Mattler, for the appellants.

M. D. White, J. N. Binford, J. E. McDonald, and A. L. Roache, for the appellee.

Simpson *v.* Gowdy and Another.

SIMPSON *v.* GOWDY and Another.

Where the property of an insolvent debtor is conveyed to a person in trust, to be by him sold and disposed of, for the benefit of the creditors of the assignor, and such person accepts said trust, and in discharge of the duties thereof, converts all of said property, except one claim, into money, and distributes the same, *pro rata*, among all the creditors, except one, to whom he pays nothing, and, then, from motives of sympathy, indulges the party owing said uncollected claim, until the same is barred by the statute of limitations, and is thereby lost, such trustee will be liable for the amount of said claim, to the creditor to whom he had paid nothing, to an amount sufficient to make him equal, in the distribution of the entire proceeds of said property, with the other creditors.

APPEAL from the *Floyd* Circuit Court.

PERKINS, J.—One *Thomasson* was indebted to *Gowdy and Terry*, and several other persons. *Arthur J. Simpson, Esq.*, was the attorney for the larger portion of these creditors, and *John Baker, Esq.*, for the residue; and the claims of the creditors against *Thomasson* were in the hands of these attorneys for collection.

Thomasson being unable to pay the cash, assigned property to these creditors, deemed sufficient to produce a fund equal to the aggregate of the debts. The property consisted of dry goods, etc., was accepted by the creditors, and placed in the hands of their said attorneys, who undertook to dispose of it for the payment of the debts. Subsequently, *Baker* relinquished all participation in the management of the property to *Simpson*, leaving to him the task of disposing of the property and paying all the claims, those in his own hands and those in the hands of *Baker*. *Simpson* undertook to perform the task. He sold all of the property, and, out of the proceeds, paid all of the creditors, except *Gowdy and Terry*, sixty per cent. on the amount of their claims. To *Gowdy and Terry* he had paid nothing up to the

Simpson v. Gowdy and Another.

time of this suit; but there was still due to *Simpson*, on the sale of the property, enough to pay them about the same percentage that the other creditors had received, and for about that per cent. the Court gave judgment against *Simpson*, in this case.

As has been indicated, *Simpson* had not collected the amount for which judgment was given against him; and the reason why he had not, was, that the person owing the amount to him had been unfortunate, and, through sympathy for him, in his misfortunes, *Simpson* had indulged him till the statute of limitations had come to his relief.

There was doubtless humanity in this, on the part of *Mr. Simpson*; but he will have to learn, if he has not already, that the cry of the debtor, for the sympathy of his creditor, generally falls upon a deaf ear, and the law knows of no such plea as sympathy or humanity, as a defense to an action for the debt.

Properly, an action against a trustee should be for an accounting and distribution; but, in this case, as all the other creditors received their *pro rata* share, as determined by the assignee, and the property remaining, for which he is accountable, is just about the sum to which the appellees are entitled, we think this judgment should be suffered to stand. See *Bennett v. Preston et al.*, 17 Ind. 291. *Huss v. Shrewsbury*, 18 Ind. 79. *McClerry v. Matson*, 2 *Id.* 79.

The complaint averred a demand and refusal to pay before suit brought; and, if a demand was necessary, at all, and the averment of it was not sufficiently special, a motion should have been made to the Court to require it to be averred with more particularity and certainty. A demand was proved on the trial. On the whole, we think the judgment should be affirmed, with one per cent. damages and costs.

Per Curiam.—The judgment is affirmed accordingly.

A. J. Simpson, for the appellant.

Ambrose B. Carlton and Gideon Putnam, for the appellees.

Shafer and Others *v.* Bardener and Others.

THE INDIANAPOLIS AND CINCINNATI RAILROAD CO. *v.* LOGAN.

APPEAL from the *Decatur* Circuit Court.

Per Curiam.—This case is here upon the evidence, which presents these facts: The railroad runs through *Logan's* farm. It was fenced; but the railroad company, wishing to build a small bridge, removed the fence for a few rods, each way, from the locality of the bridge; thus leaving a couple of gaps in the fence that separated *Logan's* pasture-field from the road. After *Logan* discovered the gaps, he hauled rails to them, and asked the railroad employees to stop the gaps with them, in the intervals when they were absent from the bridge, and they promised to do so; but, instead thereof, on Saturday night, they left the gaps open, and, through one of them, *Logan's* hogs passed upon the railroad track, and were killed by the cars. The hogs were killed where the road was unfenced, and where the railroad company was inexcusable for leaving it so during the night on which the hogs were killed.

Affirmed, with one per cent. damages and costs.

John S. Scobey and Will. Pound, for the appellant.

Oscar B. Hord, Cortez Ewing, and Samuel Bryan, for the appellee.

SHAFTER and Others *v.* BARDENER and Others.

In applications for the location or change of public highways, pending in the Common Pleas or Circuit Court, on appeal from the Board of Commissioners, all errors, not properly presented to the Court of Commissioners, will be considered by the Appellate Court, to have been waived.

Where viewers report that a proposed location, or change, of a pub-

Shafer and Others v. Bardener and Others.

lic highway, will not be of public utility, it is not competent for the appellate, or inferior court, to order such location, or change, to be made.

APPEAL from the *Hamilton* Circuit Court.

DAVISON, J.—*George Shafer* and others, on the 20th of November, 1855, filed their petition, before the board of trustees of *Jackson* township, in *Hamilton* county, for the change of a public highway in said township. The petition describes the proposed change, names the owners of the lands through which it will run, and prays the appointment of viewers, etc. The board, in accordance with the prayer, appointed three viewers, who, at the June term, 1856, of said board, reported that they had laid out and marked the proposed change, or new way, and that the same was of public utility. And, thereupon the board, the said report having been read, ordered that the same be confirmed, and that the change, or new way, be opened to the width of thirty-three feet, “and that it be, hereafter, kept in repair,” etc. In the transcript of the proceedings of said board, and immediately succeeding the above order, there is set forth the remonstrance of *Henry Bardener* and others, against the confirmation of the foregoing report of said viewers. That remonstrance alleges, “*inter alia*,” that such change, or new way, if confirmed, will be greatly to the damage of the remonstrants; and they, therefore, pray a review, etc. And the board, thereupon, made an order appointing *Joseph Sanders*, *Thomas Chew*, and *Elias Johnson*, to review the proposed change, or new way, “and the adjacent lands;” and further, the board ordered, that the reviewers, thus appointed, having completed such review, report their doings in the premises, etc. At the next term, to-wit: on the 25th of October, 1856, the reviewers reported, that they had, in pursuance of said order, reviewed the proposed change, or new way, “and the adjacent land of *Henry Bardener*, through which it passes, and

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are of opinion that said new way will be of public utility, and that *Bardener*, by such change, will sustain no damage." And this report being read, the board confirmed it, ordered that the same be recorded, and that the new way be opened and kept in repair as a public highway, etc. From this order *Bardener* appealed to the board of commissioners of said county. In that Court viewers were appointed, who, at the June term, 1857, reported to said board of commissioners, that "the proposed change, or new way, was of public utility," etc. Thereupon, *Bardener* filed his remonstrance against said report, and therein prayed a review, and the assessment of damages, etc. Upon the remonstrance thus filed, the board appointed viewers, to make such review, and they, at the September term, 1857, reported that "the proposed change, or new way, would be of public utility, etc., and, if established, *Bardener* would sustain no damage."

The record shows, that *Bardener* appealed from the decision of the board of commissioners. In the Circuit Court, to which the cause was taken by appeal, the petitioners moved to dismiss the appeal, on two grounds: 1. Because the appeal bond, for the appeal from the decision of the township trustees to the board of commissioners, was not filed within thirty days after said trustees rendered final judgment in the case. 2. That *Bardener* did not present his remonstrance and claim for damages to said trustees, until after they had finally acted upon the petitioners' petition, and ordered the proposed change to be made, and the new way to be opened, etc. These alleged defects in the proceeding occurred before the township trustees, but they do not appear to have been presented to the consideration of the board of commissioners, while the cause was in progress in that court. And the result is, they were not available, in the Circuit Court, for any purpose.

The issues were submitted to a jury, who found as fol-

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lows: "We, the jury, find that the proposed change in said road is not of public utility, and further, if the new road is located on the proposed line, we assess the damages of *Henry Bardener* at eighty dollars."

Motions for a new trial and in arrest having been overruled, the Court rendered the following judgment: "It is, therefore, considered by the Court, that if the petitioners shall pay to *Henry Bardener*, or pay into the clerk's office of this Court, for his use, within ten days from this date, the sum of eighty dollars, as damages, then, and in that case, the clerk of this Court is required to issue a copy of this order, directed to the trustee of *Jackson* township, also a description of the proposed change, as found among the papers of this cause. It is further considered, that the remonstrant recover of the petitioners all costs and charges herein laid out and expended," etc.

This judgment can not be maintained. The jury found "that the proposed change of the road was not of public utility," and hence, in view of the finding, no such change was allowable. 1 R. S., page 318, sec. 30. Nor was the remonstrant entitled, in any event, to recover, because, in the absence of a change of the road, he could not be damaged. The judgment is, therefore, erroneous, and must be reversed.

Per Curiam.—The judgment is reversed, with costs, and the cause remanded.

McDonald, Roache and Lewis, D. C. Chipman, and E. S. Stone, for the appellants.

D. Moss, for the appellees.

Rulo *v.* The State.

FESLER *v.* KNIGHT.APPEAL from the *Morgan* Common Pleas.

Per Curiam.—This was an action, by the appellant, who was the plaintiff, against *Knight*, commenced before a Justice of the Peace. The cause of action is thus stated:

“MORGANTOWN, May 21, 1859.

“*John W. Knight*, to *William Fesler*, Dr.:

“To use of lot, No. 50, in the town of *Morgan-town*, from August 1st, 1855, until May 1st, 1859, \$33 00

“For clearing litter off lot, - - - - 50

“\$33 50”

From the decision before the Justice, there was an appeal. And in the Common Pleas, to which the cause was taken by appeal, the Court tried the issues, and found for the defendant. Motion for a new trial denied, and judgment. The evidence is upon the record. We have examined carefully, and are, decidedly, of opinion that a new trial should have been granted.

The judgment is reversed, with costs. Cause remanded for a new trial.

W. R. Harrison, for the appellant.

Hester and Phelps, for the appellee.

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RULO *v.* THE STATE.

When a prisoner is on trial for murder, and one of the jurors becomes sick, and asks to be discharged, and the prisoner refuses to consent to such discharge, and the Court, without any sworn statement from the juror, as to his condition, or any evidence of any physician on the subject, discharges the jury, such discharge will be a bar to a re-trial of the prisoner.

Rulo v. The State.

APPEAL from the *Allen* Circuit Court.

Per Curiam.—On Tuesday afternoon of the week, and after the cause had been given to the jury, in this case, which was a trial for murder, one of the jurors informed the Court as follows, viz: "that one of his teeth had been broken off some twelve days previous to that time, and that it gave him much pain; that he had taken the neuralgia in his face; that it was much swollen; that he had been under medical treatment therefor, but, in consequence of his being confined on the jury, he had not slept three hours since the trial commenced; (the actual continuous confinement, it appears by the record, to which he had then been subject, commenced the afternoon of the previous day, Monday,) was in much pain, and believed he could not longer remain on the jury without serious and permanent injury to his health."

The defendant thereupon offered, that he would consent to the release of the jury from confinement, and to their separation, during their deliberations, so that the juror could receive treatment for his tooth, as if he were not on the jury, but insisted upon a verdict before the jury was discharged. The Court, however, without his consent, and without hearing further from the sick juror, discharged the jury, refused a motion to discharge the prisoner, and remanded him back to prison.

The statement of the juror was not under oath, and no medical evidence was heard, as to his situation. A case of necessity for discharge, within the previous rulings of the Supreme Court, was not made. The jury should not have been discharged. The discharge is a bar to a re-trial of the defendant, and his motion for his own discharge should have been sustained.

But, as the appeal is not from a final judgment, the appeal must be dismissed, with costs. *Miller v. The State*, 8 Ind. 325.

The cause is dismissed, with costs.

David H. Colerick and John Colerick, for the appellant.

Boyle v. Munn.

Boyle v. Munn.

No point decided.

APPEAL from the *Clinton* Common Pleas.

HANNA, J.—Suit on a note, and judgment by default, for the plaintiff. Pending the suit, an attachment was taken out, based upon an affidavit of non-residency. After the judgment, in the principal action, the defendant appeared and answered, as to the attachment, that he had been, etc., and still was, a resident of the State, etc. Reply in denial. Trial, finding, and judgment for the defendant. The evidence is in the record, and tends to show, that the defendant intended to remove beyond the limits of the State, if a certain event did not transpire. When the attachment was taken out, the time within which the said event might happen had not passed. The defendant did not remove from the State, but did from the county.

The question is argued here upon the evidence, and as if the determination to leave the State had become fixed, and been acted upon. From that evidence, the Court may have found that no such conclusion had been arrived at; that is, there is evidence tending to sustain such a position. We need not, therefore, pass upon the point pressed, to-wit: that said proceedings would lie against the property of one in the act of removing beyond the limits of the State.

Per Curiam.—The judgment is affirmed, with costs.

J. N. Sims, for the appellant.

R. P. Davidson, for the appellee.

Alexander v. Byers.

ALEXANDER v. BYERS.

Where a debt is paid in paper, in the similitude of bank bills, which is unauthorized and void, but is at the time current, and the person, to whom the same was paid, brings his suit to recover upon the original demand, the defendant may plead in bar of his action, that the plaintiff, to whom such paper was paid, passed the same, at par, to other persons, who returned the same to the defendant, and that the defendant redeemed the same, so that the plaintiff suffered no injury by reason of the reception thereof.

And a reply to such defense, admitting the delivery of such paper, and averring that the bank, issuing the same, was not organized, etc., but was in violation of the laws and constitution of the State; and that the notes, etc., were issued in violation, etc., but were in the form and similitude of bank notes, and were intended to be used, etc., as bank notes, but had no legal value, and were unconstitutional—void; and, that, therefore, the payment in the same was not valid, etc., is bad on demurrer, because it fails to take direct issue on the facts averred in such defense, or to set up other facts sufficiently responsive thereto.

APPEAL from the *Owen* Circuit Court.

HANNA, J.—Suit to recover for one hundred and eight hogs, sold and delivered.

Answers. 1. Denial. 2. Payment. 3. That the defendant delivered to the plaintiff twenty-five hundred dollars of the bills of the *Citizens' Bank of Gosport*, which were of the value of twenty-five hundred dollars, which were current, and receivable at par, as money, in all commercial transactions, and were received by the plaintiff in full, etc. 4. Similar to the third, and in addition, that the plaintiff paid said bills to, etc., and received a valuable consideration therefor; that said persons, etc., afterward brought said bills to the defendant, who received the same, and gave in exchange current funds in full; and that said plaintiff has not suffered any injury, etc.

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Reply. 1. Denial. 2. To third and fourth paragraphs, admits the delivery of the notes on the *Citizens' Bank*, but avers that said bank was not organized, etc., but was in violation of the laws and constitution of *Indiana*; and the notes, etc., were issued in violation, etc., but were in the form and similitude of bank notes, and were intended to be used, etc., as bank notes; that they had no legal value, but were unconstitutional and void, and said payment was, therefore, not valid, etc.

A copy of one of said notes is appended to the reply.

Demurrer to the reply overruled, which presents the only point made in the briefs of counsel.

It is urged that this case falls within that of *Dakin v. Anderson*, at the May term, 1862, and should be governed by the same rule of decision.

In its inception, that suit was similar to this, in this, that it was instituted for goods sold, regardless of the kind of paper received for, or upon, the same. But the pleadings, subsequent to the complaint, showed a different state of facts, and facts upon which it was made to turn here, viz., that the action of the plaintiffs had been such as to preclude or estop them from maintaining said suit.

It was averred, that the defendants, in that case, acted in the premises upon the suggestion or procurement of the plaintiffs. Here, there is no such allegation; but the question arises, Whether the acts of the plaintiff, in paying out said paper, subsequent to the reception of such illegal paper, as averred in the answer, and not denied by the reply, and the acts of the defendant, in receiving or redeeming the same, can be considered as operative to discharge any liability said defendant might have incurred to the plaintiff by the transaction?

The reply, having thus failed to take direct issue upon the facts averred in the answer, we think, failed also to set up any other facts which were sufficiently responsive to that

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answer. It may be true, as set forth in said reply, that the paper received by the plaintiff, on account of said sale, was illegal, and its reception did not amount to a discharge of the claim; but the further facts pleaded in the answer, and not responded to, it appears to us, were a sufficient answer to the demand. When it was shown that the paper passed out of the hands of the plaintiff, at its full face, the only reason that could exist, why he was in a position to suffer damage by its original reception, would be upon the principle that he might be liable to those to whom he passed it. It is not necessary for us to decide, whether the plaintiff could maintain his action, because of the possibility of being, at some future period, made to suffer in consequence of this liability, for, in our opinion, either of two reasons may be given, on the state of facts pleaded, clearly demonstrating, that such liability can not arise in the future, in this case. *First.* The defendant put the paper in circulation by passing it to plaintiff, who passed it to others, and they back to the defendant, for current funds. It may be said, then, that this payment of current funds was so much money expended by the defendant for the use of the plaintiff, in taking up the paper upon which the said liability might arise. *Second.* The paper having returned into the hands of the person (the defendant) who first put it in circulation, Courts would not favor a multitude of suits, by which it would be returned, or the liability traced, through the plaintiff, to ultimately rest upon the defendant, even if his redemption or reception of the same did not operate as an extinguishment of such possible liability, a question we need not decide.

There was error, therefore, in overruling the demurrer to the reply, which was, as the evidence shows, to the injury of the defendant.

Per Curiam.—The judgment is reversed, with costs, and the cause remanded for further proceedings.

Schurman *v.* Vagen.

J. E. McDonald and A. L. Roache, for the appellant.
Thomas A. Hendricks and Samuel H. Buskirk, for the
appellee.

SCHURMAN *v.* VAGEN.

APPEAL from the *Marion* Circuit Court.

Per Curiam.—Suit to rescind a contract, and to recover damages. There was a demurrer sustained to the complaint.

It was averred, that a contract was entered into between the parties, relative to the passage of one party, and his tenants, over the property of the other, in such terms as, perhaps, created an easement. This privilege was to be enjoyed on certain conditions, relative to the use of such property. If those conditions were violated, and such violation continued after certain notice, provided for, then the party granting the easement might stop the passage of said persons, etc.

It is further averred, that certain acts had occurred, which were a violation, etc.; that notice had been given, but that the same were continued; and the other party refused to permit the passage, etc., to be stopped.

It appears to us, that the complaint was sufficient, as to the recovery of damages, in reference to some violations named, but not to rescind; perhaps though to compel a performance, which in this case would, in the main, operate as a recision, as it might enable the plaintiff to end the enjoyment of the easement.

The judgment is reversed, with costs. Cause remanded.

Newcombe and Tarkington, for the appellant.

Daniels and Another v. Little and Others.

LOWRY v. KAHN.

APPEAL from the *Howard* Common Pleas.

Per Curiam.—The bill of exceptions in this case, containing the evidence, was not filed until after the term. No time was given to file it. The questions attempted to be presented arise upon that bill. There is nothing before us.

The judgment is affirmed, with five per cent. damages and costs.

Havens and Brouse, for the appellant.

N. R. Lindsay, for the appellee.

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DANIELS and Another v. LITTLE and Others.

Prior to the witness-law of 1861, where a party to an action was called as a witness by the adverse party, and, on his examination, gave testimony not responsive to the inquiries addressed to him, then the party calling him might offer himself as a witness as to the matter embraced in said testimony.

APPEAL from the *Miami* Common Pleas.

HANNA, J..—Suit to recover damages for the non-fulfillment of a contract, as follows:

“Memorandum, etc., made this 25th day of November, 1857, by *Burns & Daniels*, of the first part, and *Little & Co.*, of the second part, witnesseth: that the parties of the first part, agree to furnish and deliver, to said party of the second part, at the depot of the *Toledo*, etc., road, one hundred barrels flour, of an extra quality, etc.; and more, to the amount of five hundred barrels, if said *Little & Co.* should wish; and in consideration, etc., said parties of the second part, agree to advance said *Daniels & Burns* money, from

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time to time, to purchase wheat, for the purpose of making said flour. The wheat, so purchased, to be paid for at the same price paid at *Peru*, or lower if possible, and for every five bushels, so bought, the said *D. & B.* are to deliver one barrel of flour as agreed, said *Little & Co.* to pay for hauling said flour to *Peru*, at a sum not exceeding one shilling per barrel; said flour to be delivered as fast as made, and all to be delivered by the first day of January, 1858, and *D. & B.* hereby acknowledge the receipt of two hundred dollars, as an advance on said contract."

The breach charged, was, that *Daniels & Burns* failed to deliver at, etc., the one hundred barrels of flour, or any part thereof, and have also failed to repay said two hundred dollars, and the interest thereon.

Answer. 1. Denial. 2. That the plaintiff, before the time had expired for the delivery, etc., demanded, and the defendants repaid, said sum advanced, and interest thereon, in full settlement, etc. 3. That the defendants were, on, etc., at, etc., the owners of a mill, at which wheat was to be purchased, and said flour was to be manufactured; that, from the time of making said contract, until the first of January, when, etc., owing to high waters and the impassable condition of the roads leading to said mill, they were unable to purchase wheat, at *Peru* prices, out of which to manufacture flour; and that the market price, at said mills, was, during, etc., five cents per bushel higher than at *Peru*; and that they repaid said sum, etc. 4. Avers a demand of the money advanced, on the 10th day of January, 1858, and the repayment thereof, and five dollars interest, and that thereby said contract became rescinded.

Reply. General denial to the whole answer; and, second, as to the third paragraph, that on the 15th of December, 1857, the defendants had in their possession five hundred bushels of wheat, purchased with the money of the plain-

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tiffs, with which they might have made one hundred barrels of flour, etc., but that they failed, etc.

Trial; general verdict for the plaintiffs, and finding on special interrogatories. Questions are made upon the ruling, upon the admission of, and refusal to admit, evidence, and upon instructions given and refused.

The Court refused to permit the defendants to introduce evidence to sustain the third paragraph of their answer. This ruling involves the construction that should be given to the agreement. As the plaintiffs were to have a barrel of flour for every five bushels of wheat purchased, and were to furnish the money to buy the wheat, it was, of course, to their interest to procure it at as low a rate as possible. They might have fixed the precise rate, beyond which the defendants were not permitted to go. They did not do so in figures, but agreed that a greater price, or sum, than was paid at *Peru*, should not be paid by the defendants at their mills, which, the answer shows, were six miles from that point.

It is urged, that this provision in the agreement should not be construed as forbidding the defendants from purchasing, on account of the plaintiffs, but merely as limiting the price at which the plaintiffs were to furnish money, namely, *Peru* prices, and that the defendants assumed the risk of procuring the article at that price. If they could not, it would be their loss, but could not excuse them from performing. We do not think this is the proper construction, or legal effect, of the agreement. In other words, we think the third paragraph of the answer was valid, and, as a consequence, evidence should have been received to sustain it. The language used is, that "the wheat, so purchased, to be paid for at the same price paid at *Peru*, or lower if possible." Whatever might have been the construction of this sentence, without the latter branch, it is certainly shown by that portion of it, that the defendants were the persons who were to make the purchases, at the *Peru* price, or lower if

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possible. This being so, it operated as a limitation upon them, and they were not permitted to go beyond it, at the expense of the plaintiffs, and, we suppose, could not be compelled to, at their own expense, as it does not appear that they were to furnish any of the money to make the purchases with.

The trial, in this case, came off on the 8th day of March, 1861. The defendants introduced one of the plaintiffs as a witness, and asked him the following question: "State whether, about the 1st of January, 1858, or soon after that time, you did not call on the defendants, and demand the repayment of the two hundred dollars you had advanced to the defendants on the contract?" The witness answered: "Some time, I *think*, in *February* or *March*, 1858, I called on the defendants, and demanded the money I had advanced them. They paid me two hundred dollars I had advanced them. This was in my warehouse, on the canal, in *Peru*, and was paid by *Daniels*, and was two hundred dollars, and no more, we retaining our right for damages."

The plaintiffs then asked the same witness this question, which was answered, over the defendants' objection, as follows: "State whether or not, at the time of the contract with the defendants, you had a contract for the sale of the same flour in the State of *Maine*, and if so, whether you informed the defendants of that fact or not?" Answer: "I had a contract for the sale of the flour I was to receive from the defendants, in the State of *Maine*, for nine dollars and a half per barrel. I told the defendants, at the time of making the contract, I had the flour contracted. Do not recollect whether I told them where. Did not tell them what price. I told them to fix the longest time for the delivery of it, and not disappoint me. Wheat was worth, in June, when the contract was made, about sixty cents a bushel, and on the 1st of January, 1858, about sixty-five cents. I have been a miller, and have made a barrel of flour

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out of four bushels and fifteen pounds of good wheat. It ordinarily takes four bushels and a half to make a barrel of flour. Don't know the cost of shipping a barrel of flour from *Peru* to the State of *Maine*; at that time, freight was very high. I think it could not have been more than one dollar and seventy-five cents a barrel."

Was this testimony responsive to the inquiry put to the witness? 2 R. S., p. 96; if it was not, then the Court erred in the next ruling, which was against permitting the defendant, *Daniels*, to testify as to the payment of said two hundred dollars and interest, and the understanding, at the time of the payment, relative to the sum being in full, and intended to close up the matter between the parties. The statement of the plaintiff, that the right to damages was retained, notwithstanding the demand and reception of the money advanced, does not seem to be in direct response to the inquiry put to him, in relation to such demand and reception. The suit is for the two hundred dollars advanced, as well as for damages. The inquiry was directed solely to the former branch of the demand, and did not touch the question of damages, proper, resulting from the non-fulfillment of the contract. Suppose the suit had been for such damages alone, the inquiry, so far as we understand it, would not have been pertinent to the issue.

The plaintiff, then, having gone beyond a due response to the inquiry put, and testified as to another branch of the case or cause, of damages, not included in such inquiry, the defendant had a right to be heard as a witness upon the same matter.

No point is raised, and we decide nothing, as to the right to join a demand for the recovery of the money advanced, with a demand for damages for the non-fulfillment of the contract.

Another question arises upon this evidence, and the other, of a kindred nature, which was introduced, as well as the

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instruction based thereon, in relation to the measure of damages, when considered in connection with the place of delivery, and the fulfillment of another contract, then held by the plaintiffs, with some other persons, at a distant point from the place where said defendants were to make such delivery.

The statute then was, that a party introduced as a witness, by the adverse party, might testify in his own behalf as to any matter pertinent to the issue. *Id.*

No averments are contained in the complaint, relative to any special damages resulting from the non-fulfillment, by the plaintiffs, of some other contract, because of the breach of this by the defendants; if such averment would have been valid, or such damages legitimate, are questions that do not, therefore, arise, and about which we say nothing.

That part of the testimony of the plaintiffs, and the instructions based thereon, in relation to the contract in *Maine*, should not have been received or given. It was not relevant to the issues made.

Per Curiam.—The judgment is reversed, with costs. Cause remanded for further proceedings.

Harvey J. Shirk and Lyman Walker, for the appellants.

N. O. Ross and R. P. Effinger, for the appellees.

SIDENER v. FETTER.

Suit by a physician, against his patient, for professional services, consisting of visits, for which the physician demanded to be paid at the rate of one dollar and fifty cents per visit.

On the trial, the defendant offered to prove, that before, and at the commencement of the account sued on, the plaintiff had been his family physician, and had charged him for previous and similar services and treatment, including medicines, at rates not lower

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than fifty cents, or over one dollar and twenty-five cents per visit, and that no contract was made as to the price to be charged for the services now sued for.

Held, that such proof was competent, as tending to establish an implied contract as to the prices to be charged for the services sued for.

APPEAL from the *Bartholomew* Circuit Court.

HANNA, J.—Suit on account for visits, etc., of a physician. The services, and reasonableness of the amount charged, were proved. The amount charged was at the rate of one dollar and fifty cents per visit.

On the trial, the defendant offered to prove, “that previously, and up to the commencement of the account in question, said physician had been the family physician of said *Sidener*; and that he had settled with said *Sidener*, before the commencement of the account in suit, for the previous services rendered by him, and similar services and treatment, including medicines, at and for charges from fifty cents to not exceeding one dollar and twenty-five cents per visit; and that no new contract or agreement was made, as to charges for services, in this account.”

The evidence was not heard. The only question is, Was the ruling correct?

We are of opinion, the evidence ought to have been received, as tending to establish circumstances showing an implied contract or understanding in relation to the amount which should be charged for services of the character named.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

S. Stansifer, for the appellant.

R. Hill, for the appellee.

Jackson v. The State.

JACKSON v. THE STATE.

This Court does not judicially know that wine is not intoxicating, and will not question the right of the Legislature to declare it to be intoxicating.

In all prosecutions for crime, the proof must be so certain as clearly to establish the jurisdiction of the Court.

APPEAL from the *Grant* Circuit Court.

HANNA, J.—Indictment, at the August term, 1861, for “retailing a quantity of intoxicating liquor less than a quart, to-wit: one gill of wine, for five cents,” etc.

Motion to quash overruled. It is argued, that wine is not here alleged to be, nor is it, in fact, an intoxicating liquor. The prosecution is under the statute of March 5, 1859, the second section of which declares, that “intoxicating liquors,” as used in said act, shall apply to any spirituous, vinous, or malt liquor, etc.

But, it is urged, that the Legislature has no power to thus declare that to be intoxicating which is not so—and that wine is not so. We do not judicially know that fact. This does not, therefore, present a case, where we can consider the power of the Legislature in the matter indicated. The motion to quash was correctly overruled.

The sale was charged to have been made, to one *John D. Timmony*, on the 20th day of May, 1861. The record shows, that “the State, to prove the issue on her part, offered *John D. Timmony*, who testified as follows: ‘I bought a gill of sweet wine, of the defendant, for five cents, at *Grant* county, about the time charged in the indictment.’” This was all the evidence. Was it sufficient? It is said that it does not fix the time or place of sale; that the time can not be thus fixed, by reference to the indictment; and the State in which the offence was committed is not named.

The objection, that the evidence does not show that the

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sale was within the jurisdiction of the Court, seems to us is well taken. The evidence given would have as fully established the sale in any State, where there is a *Grant* county, as in this State. It is not the kind of certainty that should be required for the conviction of crimes and misdemeanors.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

N. W. Gorden and H. D. Thompson, for the appellant.

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RUPERT v. MORTON and Others.

Real estate is first mortgaged to secure school funds, and then to A to secure a debt, and then B recovered a judgment against the mortgagor, and, on an execution issued thereon, had the real estate sold, and became himself the purchaser. A then sued to foreclose his mortgage, making proper parties, and, pending such suit, the Auditor sold the real estate, on the school fund mortgage, and B became the purchaser. B answered to A's suit, setting up his title from the Auditor. A replied, that at the time of the mortgage-sale, by the Auditor, it was agreed between him and B, that he would suffer the real estate to be sold, and would not bid thereon, but would permit B to purchase the same, and that B would pay the amount of A's mortgage, if the Auditor's sale was held valid in the suit then pending.

Held, that said reply was not demurrable, and that B should not be permitted to deprive A of his priority of lien by asserting a legal title thus obtained. 16 Ind. 178. 17 *Id.* 230.

APPEAL from the *Wayne* Common Pleas.

HANNA, J.—Certain lands were mortgaged to the State, to secure school funds borrowed. Afterward, the mortgagor executed another mortgage, to the appellant in this case, to secure the payment of certain notes, as set forth in the same.

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At a still later date, *Morton* obtained a judgment against said mortgagor, caused an execution to issue, and, upon a sale thereon, purchased said premises, taking a sheriff's deed, and passing into possession.

Appellant commenced proceedings to foreclose his mortgage, making the mortgagor, *Morton*, the purchaser, and *Martin*, the county auditor, defendants. Pending the suit, the county auditor offered said premises for sale, on said mortgage, to secure the school fund, and *Morton* became the purchaser.

These facts appear in the complaint and answer.

The reply sets up, in substance, that at the said mortgage sale it was agreed, between the plaintiff and *Morton*, that the plaintiff would suffer said property to be sold, and would not bid thereon, but permit *Morton* to purchase the same, and said *Morton* was to pay the amount of the plaintiff's mortgage, if it was held valid in the suit then pending. And second, that *Morton* had fraudulently failed to pay the interest on said school fund mortgage, for the purpose of letting said land go to sale, etc.

Demurrers were sustained to these replies, which present the only points in the case.

It will be observed, that the reply does not aver that the said mortgage was, or had been, held valid, which is presented as an objection to said reply. But the main question made, as to the validity thereof, is based upon the proposition, that it is attempted thereby to set up a trust in real estate, evidenced by a verbal contract only.

On the other hand, it is insisted that *Rupert* and *Morton* were both subsequent incumbrancers, and that the latter should not be permitted to deprive the former of the priority of his right by asserting a legal title obtained in the manner set forth.

We are of opinion that the demurrer was improperly sustained to the first paragraph of the reply, in view of the

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decisions in *Arnold v. Cord*, 16 Ind. 178, and *Shepherd v. Fisher*, 17 Ind. 230; and for this error, it seems the judgment below should be reversed.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, etc.

Nim. H. Johnson and *Michael Wilson*, for the appellants.
J. F. Kibbey and *J. P. Siddall*, for the appellees.

THE NEW ALBANY AND SALEM RAILROAD COMPANY v. HUFF
and Others.

In an action against a railroad company, for damage occasioned to the plaintiffs by the erection of the road, where a general verdict was returned for the plaintiffs, the facts, that the railroad company had employed competent engineers, and had done no willful or unnecessary damage, would not entitle the defendant to a judgment, *non obstante veredicto*, because the road may have been located, and the work performed, with the utmost care, and yet damage may have resulted to the plaintiffs.

Where bills of exceptions are filed after the time allowed by the Court for filing the same, but no motion is made in this Court to strike out said bills, and no cross-errors are assigned touching the same, and the briefs of counsel are silent on the subject, this Court will consider such objections waived.

The mere fact, that parties, claiming and using a ferry right, had not regularly paid the license therefor, would not be available, as a defense, to one who should disturb those who possessed the right, or who should destroy or injure the same, but might, perhaps, be a ground for proceedings to declare the same forfeited.

A question, addressed to a witness, which merely calls for an opinion, instead of a statement of facts, upon which a verdict should be based, should be suppressed; but, if the answer to such question was such as could do no harm to the adverse party, this Court

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will not reverse the judgment by reason of the refusal to suppress the question.

APPEAL from the *Tippecanoe* Circuit Court.

HANNA, J.—The appellees sued the appellant, averring that, in the construction of the road of appellant, across the lands of appellees, the latter were injured, and that a ferry right appurtenant thereto, was, by the construction of the same, and of a bridge, for said road, likewise injured and damaged, etc.; that a claim for damages had been filed, but not acted upon. Answer in denial. It was agreed that the case should be tried, etc., as if, on appeal, the defendant not admitting that there had been any damage, and plaintiffs not conceding but that they could recover resulting damages, etc.

By agreement, there was a trial by a jury of three. General verdict for the plaintiffs, for three thousand and eighty-three dollars and fifty cents. Finding upon special points: *First*. That the damage to the land was three hundred and seventy-five dollars and fifty cents; to the ferry, two thousand seven hundred and eighty dollars. *Second*. The damage to the ferry could have been avoided by crossing at another place, at an additional expense of six thousand dollars. *Third*. Competent engineers were employed by the company. *Fourth*. No willful or unnecessary damage was done. *Fifth*. In estimating damages, supposed benefits were deducted.

It is urged, that these special findings were such, that the judgment should have been for the defendant, notwithstanding the general verdict. We think not. The road may have been located, and the work performed, with the utmost care, and yet damage may have resulted to the plaintiffs.

There are questions attempted to be raised as to rulings on the admission of evidence, and upon instructions given and refused. None of these questions are in a condition to

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be passed upon, unless certain bills of exceptions are considered parts of the record.

The trial was at the October term, 1857, and the defendant had until the next term to prepare and file bills of exceptions. They were not then filed, nor at the next term thereafter; but at the April term, 1859, to-wit: on the 16th day of May, certain agreements of attorneys, and bills of exceptions, were filed. The agreements extended the time for preparing, etc., said bills, from term to term, until and during the April term, 1859. At the time they were filed the plaintiffs objected, for various reasons, set forth in the record; among them, that such a length of time had elapsed that they could not perfect the same; that the evidence was not all included, nor correctly stated; that the time allowed by the Court had elapsed. The objections were overruled and the exceptions filed. No motion is made here to purge the record by striking out said bills; no cross errors are assigned; nor is anything said in relation to the question in the brief of the appellees.

Under these circumstances, should the objections contained in the record prevail, for if we are to consider them, they must prevail, under the decisions heretofore made; or can the objections be waived, and if given, has the party waived the same, under the rules, by not assigning cross errors, nor noticing the same in his brief?

Under these circumstances, we are of opinion, the objections made, and exceptions taken, to the rulings of the Court in reference to filing said bills, are not available here, for the reason that they are not in a condition to be considered, being waived by the appellee.

The points made by the appellant, are upon the rulings of the Court, in admitting evidence, and in giving and refusing instructions.

A record was received in evidence authorizing, or rather establishing, the ferry, for the injury to which damages are

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claimed. As those interested, so far as appears, were made parties, we see no valid objection arising out of the fact that the appellant was not a party, as it did not then have a legal existence. The further objection, that those claiming the ferry right, and operating under it, had not paid license regularly, may have been, perhaps, a sufficient reason for instituting proceedings to declare that right forfeited; but we do not think it could be available, as a defense, to one who should disturb those who possessed the right, in the enjoyment thereof; or who should destroy or injure the same.

It appears, that, after a witness had described the ferry, the bridge, and the railroad embankment, and their effect upon the ferry, he was asked this question: "What, in your opinion, is the amount of damages occasioned to the ferry of the plaintiffs, by reason of the obstruction of said bars, produced by and running below the piers of the defendant's bridge, and by reason of the obstructions of the piers and abutments of the bridge, to the passage of the ferry craft across the river at said ferry, supposing the bridge to be a permanent structure?"

This was correctly objected to, and the objection erroneously overruled, as it called for a mere opinion, instead of a statement of facts, upon which a verdict should be based. But we do not see that the ruling injured the appellant. The answer to the question was: "I don't know as I can say. The ferry now is not worth any more than keeping it up. It was valued as a good piece of property, and rented high, and now it will not rent for so much. All the difference is caused by the bridge."

It is insisted that the witness, in effect, gave it as his opinion, that a valuable piece of property was destroyed by the bridge; and it is argued that the natural result of the erection of the road was to diminish the travel over, and amount received at, said ferry.

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We think the answer will not bear that construction. It embodied, in short, the statement of several facts: 1. That the ferry was before then a valuable piece of property. 2. That it rented high. 3. It will not now rent for so much. 4. It is not now worth any more than the expense of keeping it up; that is, it will not yield any more.

Either party could have pushed the inquiry further, and ascertained from the witness, if he knew, the value of the property, before and after the erection of the bridge, and the rental value before and after, and the sources of his information on these points. But his general answer, "I don't know as I can say," would prevent the jury from being misled as to any thing further that he did say. We do not see that he gave the jury any data upon which to base a verdict, in the answer, unless it was in the statement, that the ferry would not, then, any more than pay expenses. That was assuredly the statement of a fact susceptible of contradiction, if not true. It was not the expression of an opinion, strictly speaking. As to whether the falling off, in the receipts of the ferry, was attributable to other causes, was an open question, and one not to be settled by mere opinions. The answer of the witness is not given in the form of expressing an opinion, but rather of testifying to a fact; and, we suppose, if it had not been given in connection with the form of question propounded, there would have been no difficulty about the character of the testimony.

A question is presented, upon instructions given and refused, as to the right of the plaintiffs to recover resulting damages, caused by the erection of embankments, piers, etc., beyond the line of plaintiffs' land.

The abstract right to recover has been heretofore determined. *The Trustees, etc. of Canal v. Spears*, 16 Ind. 441. But here there were joined two causes of action, one for taking lands, and one for consequential damages. For the first, the proceeding should have been in conformity with the

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statute. For the second, the damages could not have been claimed under such proceedings, but would have been, as they were, made the subject of a common law action. The suit was instituted in the Circuit Court for both causes, but as it was averred, and appeared, that a claim had been filed in accordance with the statute, and not acted upon by the appellant, it was agreed, that, in the pending case, the same damages shall be assessed by the jury, and the same rights vest in the defendant, upon the payment of the same, that would be assessed, or would vest, were this cause tried upon an appeal from the award of appraisers, etc., etc. "It is understood and agreed, that this agreement shall not be construed to waive any right the plaintiffs may have to recover for unnecessary and avoidable damages, if any were done, nor to any admission that the defendant did such damages, or are liable for the same."

It is insisted that, under this, the inquiry before the jury was limited to such damages as were occasioned by the taking of the plaintiffs' lands, that is, to such as could have been assessed by appraisers, appointed in pursuance of the defendant's charter.

No agreement was necessary to enable the plaintiffs to progress with their suit for consequential damages. Such an agreement was necessary in reference to the cause of action, which should have been laid before appraisers; that is, it would have been necessary, if such steps had not been taken, but as it was averred, the plaintiffs had performed their part, and the defendant had been negligent, it appears to have been thought necessary, to give the Court jurisdiction, that it should be agreed, that matter should be heard as on an appeal. We are of opinion, that the agreement applied to that class of damages only, and not to that concerning which an independent right of action existed.

Per Curiam.—The judgment is affirmed, with two per cent. damages and costs.

Honeywell v. Helm.

H. W. Chase and J. A. Wilstach, for the appellant.
John Pettit, Samuel A. Huff, and Godlove O. Behm, for the
appellees.

HONEYWELL v. HELM.

An answer to an action upon a note, in these words: "The defendant says that the note, in the complaint mentioned, was obtained from him by fraud, covin, misrepresentations, and deceit, of the said plaintiff, and without any good or valid consideration, and this," etc., is neither sufficient as a general answer of want of consideration, for it seems to admit that there was some consideration for the note, but fails to set out the facts which render it invalid, nor as a general answer of fraud, because it is too uncertain.

APPEAL from the *Fayette* Common Pleas.

HANNA, J.—Suit on a note. *Answer*: fraud and false representations in regard to the location, etc., of certain lands, which were the consideration for said note, etc.; also a paragraph in the following form: "And for further answer in this behalf, the defendant says that the note, in the complaint mentioned, was obtained from him by the fraud, covin, misrepresentation, and deceit of said plaintiff, and without any good or valid consideration whatever; and this," etc.

One party insists that this is a general answer of fraud, and, therefore, a demurrer was well taken to it; the other, that it is a general answer of want of consideration, and the said ruling consequently wrong.

It does not appear to us to be either the one or the other. As a general answer of fraud, if it was such, it would be bad. It seems to admit that there was some consideration, but the pleader assumes to determine that it was not a valid one,

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for what reason, we are not informed. It is too uncertain a mode of pleading; does not give the facts upon which the conclusion is drawn, that the consideration was invalid; of course this could not be done, in an instance where it is expressly stated that there was no consideration. The demurrer was, therefore, properly sustained.

There was a reply in denial to the other paragraphs of the answer. Trial and judgment for the plaintiff.

The evidence was very conflicting, as to the representations, etc.; but this was a question for the jury, and, under our repeated rulings, we can not disturb the finding.

Per Curiam.—The judgment is affirmed, with one per cent. damages and costs.

N. Trusler, J. B. Julian, and E. Vance, for the appellant.

B. F. Claypool, J. C. McIntosh, and J. M. Wilson, for the appellee.

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LASH and Others v. PERRY.

In an action for possession of, and to quiet title to, real estate, the plaintiff's deed is mere evidence of his title, and it is not, in such sense, the foundation of his action, as to require it to be set out in his complaint, by copy or otherwise.

APPEAL from the Morgan Circuit Court.

HANNA, J.—*Nathan Perry* filed a complaint, averring that he was the owner of a described parcel of land; that one *Scaggs* had recovered a judgment, before a Justice, against one *Richard Perry*; had filed a transcript, etc.; taken out execution, and caused the same to be levied upon the land of the plaintiff, which was sold, and said *Lash* became the purchaser, and received a sheriff's deed; that the judgment and proceedings were irregular and void; that he was the owner of the land before, and at, the rendition of the judg-

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ment, and continuously thereafter. A transcript of the proceedings, execution, and deed, is filed.

A demurrer to the complaint was overruled. It is insisted that the complaint was defective, because it did not set out a copy of the deed, or other evidence of title, upon which the plaintiff rests his ownership of the lands.

A deed is mere evidence of title. The foundation of the plaintiff's suit is his right to the land, his title; not the evidence of that right or title. Therefore, as the evidence was not the foundation of the suit, the statute does not require that it should be made a part of the complaint.

The relief sought was, that the sheriff's sale and deed should be set aside, and the title of the plaintiff quieted.

The answer did not, in any way, refer to the judicial proceedings, nor claim title under them, but simply averred, that the plaintiff held by virtue of a deed of gift from *Richard*, his father, and that it was made to defraud the creditors of said *Richard*, among whom were the defendants.

It is urged, that the answer is defective, because it does not go to the whole complaint, in this, that it shows no reason why the sale and deed should not be set aside, as prayed.

It was not necessary for the answer to reiterate the facts stated in the complaint, in view of the purpose of the suit. Indeed, by not denying, the defendant admitted the statement to be true, but set up other facts, which, in connection with those already pleaded, he relied upon; that is, that the plaintiffs' deed was fraudulent.

So far as depended upon the pleadings, the facts appeared to be presented to the Court.

Per Curiam.—The judgment is reversed, with costs.

Nave and Harrison, for the appellants.

Overstreet and Hunter, for the appellee.

Mahon *v.* Mahon's Administrator.

SUMNER *v.* SHIRTS.

APPEAL from the *Hamilton* Common Pleas.

Per Curiam.—In this case, there was judgment for the plaintiff, below, for three hundred and one dollars and fifteen cents, and it is claimed by the appellant, that the judgment is erroneous, on the ground that the complaint claimed judgment for one hundred dollars only. This is a mistake. The record, as it comes up to us, shows that the complaint claimed judgment for four hundred dollars.

The judgment below is affirmed, with costs, and five per cent. damages.

J. N. Evans, for the appellant.

MAHON *v.* MAHON'S Administrator.

Where an action is begun in the name of an administrator, and before its determination he dies, and the name of an administrator, *de bonis non*, is substituted as plaintiff, objections to the manner of the appointment of the latter can not be noticed in this Court, unless they were properly brought to the attention of the Court below.

After an action has been dismissed by the plaintiff, and then reinstated upon the docket, the voluntary appearance of the parties to the action, and submission of it for trial to the Court, amount to a waiver of the dismissal.

Where a Court gives time to file a bill of exceptions, and the same is not filed within the time given, it will not be considered as forming any part of the record, in this Court.

APPEAL from the *Huntington* Circuit Court.

WORDEN, J.—This was an action commenced by *Mahala*

Mahon v. Mahon's Administrator.

Mahon, administratrix of the estate of *Archibald Mahon*, deceased, against the appellant. During the progress of the cause, the death of *Mahala* was suggested, and *Myron F. Barbour* was substituted, as plaintiff. The cause proceeded in the name of *Myron F. Barbour*, administrator of *Archibald Mahon*, as plaintiff. The action was brought upon promissory notes executed by the defendant, to the plaintiff's intestate. Issues were formed in the cause, and tried by the Court, resulting in a finding and judgment for the plaintiff.

Among the errors assigned, is this: That after the death of *Mahala* was suggested, there was no party plaintiff in Court who could prosecute the suit. This objection comes entirely too late. If *Barbour* had not been duly appointed administrator, *de bonis non*, of the estate, the objection should have been made, in some form, below, which was not done.

Another error assigned, is, that the action had been once dismissed by the plaintiff below, and there was no order reinstating it.

The original record, filed in this Court, shows that the plaintiff dismissed the action. An amended transcript, however, sent up on *certiorari*, which purports to be a full and complete transcript of the proceedings, does not show such dismissal. But, taking the original transcript as our guide, there is no error in this respect, for, after the entry of dismissal, the parties voluntarily appeared to the action, and submitted it for trial to the Court. This was a waiver of the dismissal. *Bosley v. Farquar*, 2 Blackf. 61. *Wilson v. Coles*, *Id.* 402. *Clark v. The State*, 4 Ind. 268.

The other errors assigned, are based upon matters that can only appear by bill of exceptions.

The motion for a new trial was overruled, and judgment entered, on or about the 20th of September, 1860, and sixty days were given to file a bill of exceptions. The bill of exceptions in the cause, was filed, as the clerk certifies, on

The City of Lafayette and Others *v.* Bush and Wife.

the 11th of January, 1861, and not being filed within the time limited, it constitutes no part of the record.

Per Curiam.—The judgment below is affirmed, with costs.

D. D. Pratt and *D. P. Baldwin*, for the appellant.

John R. Coffroth, for the appellee.

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THE CITY OF LAFAYETTE and Others *v.* BUSH AND WIFE.

A city, organized under the general law for the organization of cities, can not be enjoined from changing the grade of a street, or making any alteration therein, which causes consequential damages only to the adjoining proprietor, his property not being appropriated, although such damages have not been assessed and tendered.

Such consequential damage is not within the act for the incorporation of cities, which provides for assessing damages in certain cases; nor is it within the constitutional provision, that private property shall not be taken for public uses, without compensation first assessed and tendered.

But where a city desires to appropriate the real property of a citizen to the purposes of a street, the city must first comply with the provisions of the law, as to the assessment and tendering of damages to the owner.

APPEAL from the *Tippecanoe* Circuit Court.

WORDEN, J.—This was an action by *Bush and Wife* against *The City of Lafayette*, and those acting under her, to enjoin the city from using and appropriating certain lots of *Mrs. Bush*, to the purpose of a street, no compensation having been assessed or tendered. An injunction was granted, to operate until the final hearing, and from the interlocutory order thus granting an injunction, this appeal is taken.

It is now well settled, that a city can not be enjoined from changing the grade of a street, or making any alteration

Matlock's Administrator v. Tingle.

therein, which causes consequential damages only to the adjoining proprietor, his property not being appropriated, although such damages have not been assessed and tendered. Such consequential injury is not within the act for the incorporation of cities, which provides for assessing damages in certain cases; nor is it within the constitutional provision, that private property shall not be taken for public uses, without compensation first assessed and tendered. *Macy v. The City of Indianapolis*, and authorities there cited, 17 Ind. 267.

Such, however, is not the case before us. Here the city is appropriating parts of the lots of *Mrs. Bush*, to the purposes of a street, and digging and excavating them for that purpose. Provision is made for assessing and tendering damages in such cases, and the city can not thus appropriate the property of the plaintiff, without first complying with such provision. 1 G. & H. Stat., p. 231, sec. 59, *et seq.*

Per Curiam.—The judgment below is affirmed, with costs.

R. C. and J. Gregory, for the appellants.

Huff and Jones, for the appellees.

MATLOCK's Administrator v. TINGLE.

APPEAL from the *Bartholomew* Circuit Court.

Per Curiam.—Action upon a promissory note. Trial, finding, and judgment for the defendant.

The case comes before us on the evidence, from an examination of which, we are of opinion that a new trial, which was asked for, should have been granted.

The judgment below is reversed, with costs, and the cause remanded.

Francis T. Hord, for the appellant.

S. Stansifer, for the appellee.

McConnell v. Jones and Others.

FLEMING v. STOUT and Another.

Newly discovered evidence is not a ground for a review, under the code; nor is error in form only, although apparent on the face of the decree; nor is mere matter of abatement.

APPEAL from the *Vermilion* Circuit Court.

Per Curiam.—A complaint for review will not lie, under the code, for newly discovered evidence.

Such a complaint lies for newly discovered material matter, and for errors of law appearing on the face of the decree. 2 R. S. 280. *Nelson v. Johnson*, 18 Ind.

But “errors in form only, though apparent on the face of the decree, and mere matter of abatement, seem not to” be grounds for review. Ad. Eq., side p., 416. *Query*: Is an erroneous decision, upon the weight of evidence, which appears in the record, an error of law appearing in the proceedings, within the rule authorizing a review for error of law? See Ad. Eq., side p. 417, note.

The judgment is affirmed, with costs.

McDonald and Roache, for the appellant.

S. F. and D. H. Maxwell, and *D. M. Jones*, for the appellees.

McCONNELL v. JONES and Others.

Action on a note for one thousand dollars. *Answer*: That the note was executed in part performance of the following contract: “I have this day sold to B. and H., four thousand fleeces of wool, more or less, at forty-nine cents a pound; wool to be washed on the sheep, to be put up in good merchantable order, free from tags, to be delivered in *Springfield*, at the depot of the *Great Western Railroad*, on the 20th of July, 1857. Received on the

McConnell v. Jones and Others.

above contract one hundred and seventy-five dollars. Balance to be paid in cash on the delivery of the wool, except one thousand dollars, for which a note, payable at ninety days, is to be given;" and that there was a breach of the contract by the plaintiff, in his failure to deliver wool answering to the terms of the contract, and relying upon the contract *as a warranty*.

Held, that the contract did not contain a warranty, but an executory agreement to deliver washed wool, but that, if the wool had been present and delivered at the time of the execution of the contract, it would have amounted to a warranty that the wool delivered was of the quality specified in the contract.

APPEAL from the *Tippecanoe* Circuit Court.

PERKINS, J.—This was an action brought by *McConnell*, on a one thousand dollar note, made by the defendant, on July 31st, 1857, payable sixty days after date. The defense appears in two paragraphs of the answer. In the first paragraph, it is alleged, that in June, 1857, the plaintiff executed the following written contract to *Howard* and one *Bailey*:

"I have this day sold to *Bailey & Howard*, four thousand fleeces of wool, more or less, at forty-nine cents a pound. Wool to be washed on the sheep, to be put up in good merchantable order, free from tags, to be delivered in *Springfield*, at the depot of the *Great Western Railroad*, on the 20th of July, 1857. Received on the above contract one hundred and seventy-five dollars. Balance to be paid, in cash, on delivery of the wool, except one thousand dollars, for which a note, payable at ninety days, is to be given."

That, under the contract, the wool was delivered, and the note sued on, given; that thirteen thousand pounds of the wool were dirty, and unmerchantable as washed wool, and, hence, worth two thousand dollars less than if they had been in the condition specified in said contract. This diminution of value is pleaded *in bar* of a recovery on the note. It is alleged, that the wool was delivered in sacks, and was not examined.

McConnell v. Jones and Others.

In the second paragraph, the defendant relies on the recited contract *as a warranty*, and charges a breach, arising from the dirty and unmerchantable condition of the wool, with resulting damages, exceeding the amount due on the note.

The plaintiff replies in two paragraphs, each being a reply to both paragraphs of the answer; the last, however, a mere *general denial*. The first, presenting the particulars of the appellant's case, reads as follows:

"For reply to the first and second paragraphs of said defendant's amended answer, said plaintiff saith, that he admits the execution of said contract, and the consideration of said note, as charged in said paragraphs. But he saith that said defendant, *Howard*, was personally present at the delivery of said wool, and examined a part, and had an opportunity to examine all of it, at the time; that he made no exceptions, then, to said wool, but expressed himself well satisfied with its quality and condition; that said plaintiff had no reason to apprehend, or believe, that said wool did not conform to the requirements of said contract; but, on the contrary, was led to conclude that said defendant received it as fully answering the stipulated conditions; that, after receiving the same, the said defendant removed it from the State of *Illinois*, (where it had been contracted for and delivered, and where this plaintiff has always resided,) and long afterward, viz., six months afterward, put it into the general market and sold it to buyers unknown, without having, at any time, or in any wise, given this plaintiff previous notice of said alleged defects and blemishes in said wool; that, in consequence of said disposal, said wool then passed beyond the further knowledge and control of said plaintiff or defendants, and became impossible of being again identified; wherefore plaintiff saith said defendants are not entitled to the relief prayed for, etc."

To this reply the defendants demurred, and their demur-

McConnell v. Jones and Others.

rer was sustained. This left the cause at issue upon the general denial of the two paragraphs of the answer. There was a trial by jury; verdict, and judgment for defendants.

The evidence shows, that the plaintiff was a farmer, in *Illinois*, and had in the neighborhood of three thousand sheep; that some relatives of his had about one thousand more; that this was known to the defendant, *Howard*, and that the fleeces of wool mentioned in the contract, were the fleeces upon the sheep above mentioned; that the defendant, *Howard*, was present at the washing of the sheep of the plaintiff; saw the manner of washing, and as many of the sheep washed as he chose to, and expressed no dissatisfaction; that he was present, also, at the shearing, and examined as many of the fleeces taken off, and as thoroughly, as he wished to, and expressed no dissatisfaction; that he was present, again, after the shearing was done, and the wool in a room ready to be sacked, and where it was sacked, and looked over it, and expressed no dissatisfaction; that he was present at the time and place of delivery, made such examination as he pleased, though he did not open the sacks, and expressed no dissatisfaction. As to the wool from the sheep of the plaintiff's relatives, the plaintiff told defendant, *Howard*, who received it at the depot, at *Springfield*, that he could examine it there, and if it was not in good condition, he could settle with them; he could make a reduction there; that *Howard* examined, to the extent of inspecting it, where it presented itself at openings in the sacks; received the wool, without expressing any dissatisfaction, and, within the next six months, shipped it to *Lafayette*, *Indiana*, *Cincinnati*, *Ohio*, and *Philadelphia*, *Pennsylvania*, where it was sold in the general market. He gave no notice to the plaintiff of any defects in the wool, in time for him to have an examination of it, nor was there ever an offer to return it. There is no evidence of any intention of fraud on the part of the plaintiff.

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There is no evidence tending to show that the wool was not well put up in sacks; was of a quality different from the expectation of the defendants; that there was any deficiency in weight; that there were any tags in it; and there is evidence showing that the wool was washed on the sheep; but the evidence also tends to show, that it either was not washed clean, or had been so carelessly handled, afterward, as to become dirty.

The Court instructed the jury as follows:

“1. If you believe, from the evidence, that the contract, set out in the answer, was made as alleged, that contract amounts to a warranty that the wool in question should be washed on the sheep, and be put up in good merchantable order, free from tags.

“2. It is for you to say, from the evidence, whether there has been a breach of this warranty, and, if so, the amount of damage sustained on account of such breach.

“3. The proper measure of damages, in this case, is the difference between the price of wool, washed on the sheep, and put up in good merchantable order, free from tags, and the value of the wool delivered, at the time and place of such delivery.

“4. The defendants, in this action, can claim the benefit of all such damages, on the entire lot of wool covered by the warranty.

“5. If the jury find that the note sued on was given in part payment of wool sold by the plaintiff, under the warranty set up in the answer in this case, and that before and at its delivery, the defendant, *Howard*, who purchased said wool, examined a part of it, and had an opportunity of examining the balance, and received all said wool without making any objections, but expressing himself satisfied with it, and afterward shipped it into another State, and put it into the general market, and sold it to unknown buyers, without giving any previous notice of any defects in the

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wool, to the plaintiff, the jury can consider these facts as furnishing a presumption that the wool complied with the warranty, subject, however, to be rebutted by other evidence.

“6. If the jury find there was a breach of warranty in this case, as alleged in the defendant’s answer, they will estimate the damages according to the bad condition of the wool at the time it was delivered by the plaintiff, and not take into account such defects and blemishes as the wool acquired after delivery.

“7. This being a civil suit, the jury will find on the weight of evidence.

“8. The burden of evidence being with the defendants, you must, before you can find for them, be satisfied that the preponderance of testimony is with them.”

To the giving of the fourth of which aforesaid instructions, said plaintiff, by his attorney, then and there excepted.

According to the case of *Ricketts v. Hoyt*, 18 Ind. 181, the contract for the sale of the wool did not contain a warranty, proper, but an agreement to deliver washed wool. If the wool sold had been present, and been delivered at the time of the execution of the written instrument, it would have amounted to a warranty that the wool delivered was of the character specified. The instrument would then have been given upon an executed contract, and at the time of its execution. So, perhaps, if the identical wool sold had been present, though to be delivered, in its then condition, at a future day. But, as it was given for wool, to be prepared and delivered at a future time, it amounted but to an agreement to deliver, at such future time, wool of a given character; was but an executory agreement; and a failure to deliver such wool worked, not a breach of warranty of a thing sold, but a simple breach of contract for the delivery of a given kind of article; and it seems that, in the subsequent execution of such executory contract, if the party purchasing accepts the article delivered, in execution, after

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examining it, or, with full opportunity to examine, though the opportunity is voluntarily, and without any understanding with the other party, unimproved, he estops himself to deny that the article filled the requirements of the contract.

In such executory contract, the title does not, as a general proposition, pass, at the signing of the contract, to any specific article.

In view of what has been said, it would seem that the Court erred in sustaining the demurrer to the plaintiff's reply to the answer. Enough could be proven, under that reply, to maintain the suit; and if it was not sufficiently certain, it should have been made so, through a motion. Indeed, its allegations, just as they stand, avoid the answer. They affirm, that he was present at the delivery of the wool, that he actually examined a part of it, and had the opportunity to examine it all, etc., and expressed himself satisfied, etc. These allegations, within themselves, include the averment, that the wool was in such a condition that it could be examined; and an issue upon them would have brought up that fact on the trial. Exceptions were not taken upon which the judgment could be reversed on other grounds.

Per Curiam.—The judgment is reversed, with costs. Cause remanded for another trial.

Orth and Stein, for the appellant.

Huff and Jones, for the appellees.

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WHEELER *v.* RUSTON and Another.

This action was instituted for the recovery of the possession of a lot, the plaintiff claiming title under a deed from one of the defendants, which is shown, by the pleadings, to have been, in legal effect, only a mortgage; but the points decided by the Court relate to

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the sufficiency of pleadings, and can not be much more briefly stated than by a repetition of the entire opinion, and the reader is therefore referred for them, to the opinion at length.

APPEAL from the *Vanderburgh* Circuit Court.

DAVISON, J.—*Wheeler*, who was the plaintiff, brought this action against *Ruston*, to recover the possession of a lot of ground in the city of *Evansville*. The complaint is in the statutory form, *Catherine Allen* having appeared, and made known to the Court, by petition, that she was the owner, in fee simple, of the premises described in the complaint, was admitted a defendant, and thereupon she answered. Her answer alleges, substantially, these facts: In the year 1852, the defendant, having the sum of five hundred dollars, desired to purchase a small lot of ground in *Evansville*, and employed the plaintiff, who was a real-estate agent, to make a purchase for her. In the spring of that year, they went in person, and examined the lot now in controversy, which was owned by persons residing in *New York*, and which the plaintiff, as their agent, had for sale. He represented to her that the lot could be purchased for two hundred dollars, and that he could have a small house built thereon for three hundred dollars, and upon these representations the defendant employed the plaintiff to purchase the lot and build such house. On the 1st of June, in the same year, she advanced to him five hundred dollars, with the understanding that he, as her agent, should lay out the same, in the manner and for the purpose above stated. Afterward, on the 30th of July, 1852, the plaintiff procured for her a deed, in fee simple, for the lot, which is duly recorded, etc. The house was completed, and the defendant took possession of the premises, in the autumn of 1852, and she has continued in possession until the present time.

On the 3d of May, 1853, the plaintiff, under the pretense of having advanced a considerable amount of money, beyond

Wheeler *v.* Ruston and Another.

the sum of five hundred dollars, in paying for the lot and building the house, applied to the defendant, through one *William Hubbell*, for a deed, conveying to the plaintiff the premises, to secure the sums of money said to have been advanced, by him, as aforesaid. This the defendant refused, but proposed to execute to him a mortgage, to be held as such security; but *Hubbell*, who was well acquainted with business of that kind, represented that a deed would be cheaper, and that the plaintiff would, immediately, execute to the defendant an instrument, showing the intention of the parties, in making such conveyance, to be, that it was to operate as a mortgage; and defendant, being ignorant of the effect of such conveyance, and trusting in the representations of *Hubbell*, on said last-named day, executed to the plaintiff a deed, in fee simple, for the premises sued for in this action. It is averred, that said deed was executed by her, with the express understanding and agreement, that the same was to have the effect of a mortgage, to secure the plaintiff in the repayment of such sums of money as he had advanced, beyond the sum of five hundred dollars, as aforesaid, and that the plaintiff never executed to the defendant the instrument to explain the effect of said deed, by showing that it was to have the effect of a mortgage only. But he now claims the same to be an absolute conveyance, etc.

The plaintiff demurred to this answer; but the demurrer was overruled; and he, thereupon, replied thus: He denies that he represented the lot for sale at two hundred dollars, but avers, that he informed the defendant that the price of it was four hundred dollars. He paid that amount for the lot. The house and improvements erected thereon, were erected by the plaintiff, according to the instructions of the defendant, and he paid therefor four hundred dollars. The five hundred dollars, referred to in the answer, was, at the time of the negotiations, for the purchase of said lot, and

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the building of said house, in the hands of said *Hubbell*, who was the friend and adviser of the defendant; and at the time the contract for such purchase and building was made, the terms upon which it was made, and upon which the five hundred dollars was advanced, were settled upon by plaintiff and *Hubbell*, with the assent of the defendant, and were reduced to writing, which writing was signed by the plaintiff, and by *Hubbell*, as agent for the defendant, and is as follows:

“I have this day, July 30, '52, pd. to *H. Q. Wheeler* five hundred dollars, the rec't of which is hereby acknowledged. The conditions of which payment are as follows:

“*H. Q. Wheeler* is building a house in *Evansville, Ind.*, for the use and occupancy of *Mrs. C. Allen*, to cost, house and lot, about eight hundred dollars, and for which she is to pay said *Wheeler*, as rent, ten per cent. upon its cost, and has the privilege to occupy the same so long as she may desire. This occupancy to be for herself and child, and no others, except those who may be connected with her in her business, and while she remains a widow.

“For the five hundred dollars now paid, *Mr. Wheeler* agrees to allow to *Mrs. Allen*, on account of rent, ten per cent. per annum, and will allow the same rate of interest for any further sum she may place in his hands, not exceeding the cost of the said premises. Should *Mrs. Allen* at any time pay to *Mr. Wheeler* the said eight hundred dollars, more or less, and a reasonable charge for his services and disbursement in this behalf, she may become the owner of the said property, provided it shall be for her own use and benefit; but *Mr. Wheeler* will not surrender his (mortgage to be given by *Mrs. Allen*) for the benefit of any other person. *Mr. Wheeler* will repay to *Mrs. Allen*, at such times as she may demand, a part or all of the sum now paid him, and whereon the sum now paid, shall be repaid to *Mrs. Allen*.

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Mr. Wheeler shall be the owner of the property. This arrangement is made for the benefit of *Mrs. Allen*, and shall be construed liberally.

“ *W. Hubbell*, one of the signers of this agreement, acts in the matter for *Mrs. Allen*, and all subsequent negotiations upon this matter shall be with said *Hubbell*.

“ In witness whereof, we have hereunto subscribed our names, this 30th day of July, 1852. W. HUBBELL,
“ H. Q. WHEELER.”

In pursuance of the stipulations of the above agreement, the plaintiff, from time to time, upon the request of the defendant, paid to her all of said five hundred dollars, and all interest thereon, and she, the defendant, has long since ceased to occupy the aforesaid house and lot, but the same is now in the occupation of her tenants; and he avers that, prior to the commencement of this suit, he demanded possession of said premises, and also offered to convey them to the defendant, upon repayment of the money advanced by him for the purchase of the lot, and the erection of the house, but the defendant refused so to refund the money, or surrender up possession, etc.

The defendant demurred to the reply. The demurrer was sustained, and final judgment rendered, etc.

The facts alleged in the answer, at once show, that the deed executed by the defendant was, in point of law, a mortgage only, and being so, it constituted an effective bar to the action; because she had a right to possess the property until, as a mortgage, it was foreclosed. Hence, the only question to settle is, does the reply sufficiently avoid the answer? As we have seen, the written contract, which the reply sets up, was entered into, and was in existence, anterior to the date of the mortgage, and we must, therefore, presume that the parties did not intend these instruments to be in conflict with each other, and that being the case,

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the contract, though the plaintiff may have complied with it, can not be pleaded in avoidance of the answer. Indeed, the entire reply relates to matters which may have been transacted before the mortgage was given, and in reference to which it was executed. The reply does not controvert the alleged fact, that the deed was intended to have the effect of a mortgage; nor does it allege matter sufficient to avoid the answer, and the result is, the demurrer was well taken.

Per Curiam.—The judgment is affirmed, with costs.

Asa Iglehart, for the appellant.

A. L. Robinson, for the appellees.

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ADAMS and Another v. RODARMEL.

Action on two notes by R against A and B. The defendants answer, that C and D were partners, and dissolved, when C, with A and B as his sureties, executed two notes to D, for his interest in the partnership property, and he assigned them to R, and then A and B took them up, and gave in lieu thereof the notes in suit, being for the same amount; and that, before the dissolution of the partnership, the said A and B were sureties for C and D, for the payment of one thousand dollars, which they had been, since the execution of the notes in suit, compelled to pay, and that C and D are both insolvent, and have no property subject to execution, and that D assigned the original notes to R without consideration, and with intent to defraud his creditors, of which intent the said A and B had no notice, when they executed the notes in suit as aforesaid, and that D is now the real owner of the notes in suit, and they pray that D be made a party, and that enough of the amount paid by them, for D as aforesaid, to pay the notes in suit, be set off against them, etc.

Held, that said answer constituted no defense, or bar to the plaintiff's

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action, and that the claim of set-off could not be sustained, because the defendants did not become the creditors of D until after they had notice of the assignment to the plaintiff, and had executed to the plaintiffs the notes in suit.

APPEAL from the *Knox* Common Pleas.

DAVISON, J.—The appellee, who was the plaintiff, sued *Howard and Hiram Adams* upon two promissory notes, one for the payment of two hundred dollars, and the other for one hundred dollars, and each bearing date, December 31, 1858.

Defendants' answer contains five paragraphs: 1. That the notes, described in the complaint, were given without any valid consideration. The facts alleged in the second, third, fourth, and fifth paragraphs are, in effect, the same, and are, substantially, as follows:

One *Samuel Adams* and one *Oscar Rodarmel* were partners, under the name and firm of "*Adams & Rodarmel*," and, having dissolved their partnership, *Adams*, with the defendants as his sureties, executed to *Rodarmel* two promissory notes, of the aggregate amount of three hundred dollars, for his, *Rodarmel's*, interest in the partnership property. After this, *Rodarmel* assigned these notes to the plaintiff; and afterward, on the said 31st of March, 1858, the defendants, in lieu of the notes so assigned, gave to the plaintiff the notes sued on in this action. It is averred, that prior to the dissolution of said partnership, the defendants had become the sureties of "*Adams & Rodarmel*," for the payment of one thousand dollars, which they have been, since the execution of the notes in suit, compelled to pay, for and on account of, that firm; and that they, *Adams & Rodarmel*, are both utterly insolvent, and have no property liable to execution; that *Rodarmel* assigned the original notes to the plaintiff without any consideration whatever, and with intent to defraud his creditors, of which fraudulent intent the defendants had no notice or knowledge whatever, when, in lieu of

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the notes so assigned to the plaintiff, they gave to her the notes described in the complaint; and the defendants, in fact, say, that *Oscar Rodarmel* is the real owner of the notes sued on; and they, therefore, pray that he be made a party, etc., and that, on final hearing, the amount paid by them, for said firm, be adjudged a proper set-off in this suit, and that they have other relief, etc.

To the first paragraph of the answer, the plaintiff replied by a general traverse, but to the second, third, fourth, and fifth, he demurred. The demurrs were sustained, and the defendants excepted.

The Court tried the issues, and found for the plaintiff the full amount of the notes, etc. Motion for a new trial denied, and judgment, etc.

Do the facts, alleged in the paragraphs to which demurrs were sustained, constitute any defense to the action? This is the controlling inquiry in the case. The defendants, as has been seen, were the sureties of *Rodarmel* when the first notes were executed, and when he assigned them to the plaintiff; but they were not his creditors, nor did they, the defendants, become his creditors, until after they had notice of the assignment, and had executed, to the plaintiff, the notes in suit, in lieu of the assigned notes, and thus, not being creditors, could not have been defrauded by the assignment, though it was made to defraud creditors. Indeed, the assignment was a transaction to which the defendants were strangers; it was in no way connected with the consideration of the notes assigned, and its invalidity could not, therefore, be, legitimately, set up in the defense. But, as we understand the alleged facts, the defendants, when they executed their notes to the plaintiff, and, of course, had notice of the assignment, had no "defense, or set-off" against the payee, or assignor, of the original notes. 2 R. S., p. 878, sec. 3. And, that being the case, the facts alleged constitute no bar to the action.

Gregory and Others v. Slaughter and Others.

Per Curiam.—The judgment is affirmed, with costs, and five per cent. damages.

J. C. Denny, for the appellants.

John Baker, for the appellee.

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GREGORY and Others v. SLAUGHTER and Others.

Where an appeal is taken to this Court, and the record sent here is defective, it is the duty of the parties, by their counsel, to cause the same to be made correct, by a writ of *certiorari*; but, if this duty is neglected, and the cause is submitted here for decision, upon such defective record, the decision will be as operative and binding against all the parties to it, as if it had been rendered upon a perfect record.

APPEAL from the *Morgan* Circuit Court.

PERKINS, J.—In this cause, a judgment was rendered at a special adjourned term of the *Morgan* Circuit Court, in February, 1860. An appeal was taken by *Slaughter*, and the judgment was reversed, because the record did not show that the order for the adjourned term specified the reason for the adjournment. *Slaughter v. Gregory*, 16 Ind. 250. On the reversal of the judgment, the notice and opinion went back to the office of the clerk of the *Morgan* Circuit Court, and the cause went again upon the regular docket of that Court. The entire history of the cause then appeared upon its records, and it showed, that the judgment rendered in that Court had been reversed by the proper Appellate Court, and that there was, at a given date, no final judgment existing in the cause.

The *Gregorys*, however, against whom the reversal was, sought to obviate the effect of it, in this case, by moving the Circuit Court to reject the opinion of the Supreme Court.

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accompanied by the judgment of reversal, from the records of the Circuit Court, whereby the original judgment of that Court would appear to remain in force, upon its records.

The ground of the motion was, that the judgment of reversal, in the Supreme Court, was upon an imperfect record; and that the complete record of the cause, as it existed in the Circuit Court, supplied the defect for which the reversal was had, in the Supreme Court.

The Circuit Court overruled the motion to reject the opinion, and judgment of reversal, but ordered them spread upon the record.

The *Gregorys* then appealed to this Court, from that ruling of the Circuit Court; at least, we must so conclude, as the transcript shows no further trial, and no final judgment.

If, in case of an appeal to the Supreme Court, the record brought up from the Circuit or Common Pleas Court, fails to show to the Appellate Court, any entries or proceedings in the Court below, necessary to the correct determination of the cause upon appeal, a writ of *certiorari* will be issued by the Supreme Court, for the purpose of supplying deficiencies in the transcript, if such writ is applied for with reasonable promptness. Ind. Dig., p. 245. But if the cause is regularly submitted to the Appellate Court, upon a defective record, the decision made upon such submission is binding upon the parties to the cause, and the inferior Court. *Denvoll v. Jay*, 14 Ind. 400.

If the Supreme Court would refuse a writ of *certiorari* to supply defects in a transcript, on account of negligence, while the cause was pending in that Court, surely it would not allow the judgment rendered on such defective transcript to be disregarded, as this would lead to interminable confusion, and hold out a temptation to negligence.

That the Court would so refuse the writ is settled. See 2 G. & H., pp. 279, 426, notes. 14 Ind. 426. 12 *Id.* 116.

But as the appeal in this case does not purport to be

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taken for an interlocutory order, for which an appeal lies, and is not from a final judgment, the appeal must be dismissed at the costs of the appellants, as it is only in the specified cases that an appeal lies at all.

Per Curiam.—The appeal is dismissed, at costs of the appellants.

Buskirk and Harrison, for the appellants.

W. V. Burns, for the appellees.

MEYER *v.* MEYER.

APPEAL from the *Franklin* Circuit Court.

Per Curiam.—A complaint for review of a judgment, will not lie simply upon newly-discovered evidence. *Fleming v. Stout and Stout*, at this term.

The judgment below is affirmed, with costs.

John M. Johnston, for the appellant.

Kilgore and Kyger, for the appellee.

19 344
124 180

THE MAYOR AND COUNCIL OF THE CITY OF INDIANAPOLIS *v.*
GEISEL.

There is no point of interest decided herein, but the facility with which objects may sometimes be attained by the "law's delay," is well illustrated.

APPEAL from the *Marion* Circuit Court.

Per Curiam.—On the 29th day of June, 1861, *Henry Geisel, Hiram N. Wright, Christian F. Wischmeyer, and James M. Buchanan*, were elected councilmen from the eighth and

The Mayor and Council of the City of Indianapolis v. Geisel.

ninth wards of the city of *Indianapolis*. On the 2d of July, 1861, the city clerk issued to them certificates of election.

Afterward, on the same day, they appeared in the council chamber, and, before the president of the council, being the mayor of the city, they were duly sworn into office, and their oaths indorsed upon their certificates of election. On the 18th day of July, 1861, being the first meeting of the council subsequent to the election mentioned, the four councilmen named appeared at the meeting, presented their certificates, with the oaths of office indorsed, which had not before been filed with, but then were passed to the city clerk, and they proceeded to take their seats as councilmen; and, thereupon, motions were made by *Sims A. Colley* and *Andrew Wallace*, to lay the certificates of election of said members upon the table, and to exclude the members from the council, to which motion *Austin H. Brown* moved, as an amendment, the following:

“That as too many democrats lived in said wards, (eighth and ninth,) the judiciary committee be directed to report an ordinance, repealing the ordinance creating said wards.”

The councilmen who voted to exclude said *Geisel*, *Wischmeyer*, *Wright*, and *Buchanan*, from the council, were, *Sims A. Colley*, *Samuel Seibert*, *Andrew Wallace*, *Theodore P. Haughy*, *John Blake*, *Alexander Metzger*, *Stoughton A. Fletcher*, and *George W. Geisendorf*.

Those who voted against excluding them, were, *Austin H. Brown*, *Stephen McNabb*, *Jacob Vandegrift*, *Grust H. Kuhlman*, and *Charles Richman*; not voting, *W. Clinton Thompson*.

No previous action had been taken to declare a vacancy, or to provide for the election of others, as councilmen, in the places of those excluded; nor was any objection made to the character of those excluded.

The excluded members forthwith applied to the *Marion Circuit Court* for a mandate to the City Council, command-

The Mayor and Council of the City of Indianapolis *v.* Wright.

ing them to admit the excluded members to their seats. The Court issued the mandate, but the council refused to obey it, and appealed to the Supreme Court.

The cause was submitted to this Court, on Wednesday, the 26th of November, 1862, and set down for argument, on this, the 5th day of December, 1862, nearly a year and a half after the election.

As there is not, and never has been, any open question of law in the case; and as other reasons, which the council may have thought justified them in disfranchising two wards of the city, for so long a time, do not appear in the record, we do not feel that we should be excusable for prolonging the disfranchisement; especially, as it appears by the record, that, perhaps, less than a quorum may have been attempting to enact ordinances affecting the rights and interests of the people of the city. No less than ten councilmen constitutes a quorum of the representatives of nine wards.

See the cases, *The State v. Findley*, 10 Ohio Rep. 51. *The State v. Porter*, 7 Ind. 204. *Smith v. Cronkhite*, 8 *Id.* 134.

The judgment below is affirmed, with costs.

Barbour and Howland, for the appellants.

N. B. Taylor and B. K. Elliott, for the appellee.

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124 180

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THE MAYOR AND COUNCIL OF THE CITY OF INDIANAPOLIS *v.*
WRIGHT.

APPEALS from the Marion Circuit Court.

Per Curiam.—The judgment rendered herein, below, is affirmed, with costs, on the authority of the case of the same appellant against *Geisel*, at this term.

Barbour and Howland, for the appellant.

N. B. Taylor and B. K. Elliott, for the appellee.

The Junction Railroad Company *v.* Harpold and Another.

THE EVANSVILLE, INDIANAPOLIS, AND CLEVELAND STRAIGHT LINE RAILROAD COMPANY *v.* WAMPLER.

APPEAL from the *Monroe* Circuit Court.

Per Curiam.—This case should be again tried, in the light of the rulings in the case of the *Evansville, etc. Company v. Drum*, 17 Ind. 603, which, in most material respects, is similar to this case.

The judgment is reversed, with costs. Cause remanded for a new trial.

Rand and Hall, and *W. R. Harrison*, for the appellant.

W. V. Burns, for the appellee.

THE JUNCTION RAILROAD COMPANY *v.* HARPOLD and Another.

An agreement, not in writing, to convey real estate, can not be enforced, unless facts exist which remove it from the operation of the Statute of Frauds.

If a person, having title to an estate, which is offered for sale, and, knowing his title, *stand by*, and encourage the sale, or do not forbid it, and thereby another is induced to purchase the estate, under the supposition that the title is good, the person, so *standing by*, and being silent, shall be bound by the sale, and neither he, nor his privies, shall be allowed to dispute the purchase.

But, if the person, having the adverse claim, is not apprised of his rights, or the purchaser knows them to exist, these principles do not apply.

APPEAL from the *Madison* Circuit Court.

DAVISON, J.—This was an action, by the *Railroad Company*, against *Harpold* and *Williams*, to quiet title to real estate, etc. The case made by the complaint is, in substance, as follows: In the year 1853, *Harpold* and *Williams* held, in

The Junction Railroad Company v. Harpold and Another.

severalty, the fee simple of certain land in *Madison* county, and known as the south-east quarter of section 14, in township 19, north, of range 7, east; *Williams* owning the east half of the quarter, and thirty-five acres of the west half, and *Harpold* the residue of said west half, supposed to be forty-five acres. *Harpold*, being desirous of obtaining a portion of the capital stock of said company, offered to subscribe his forty-five acres at forty dollars per acre, payable in such stock; but his offer was rejected. After this *Harpold*, having ascertained that the company was willing to pay the above sum per acre, for *Williams'* portion of the land, requested him, *Williams*, to subscribe the entire quarter section, in his own name, and as his own property, at forty dollars per acre, in order that he, *Harpold*, might realize that sum, per acre, for his portion of the land; and *Williams*, in accordance with that request, and at the instance of *Harpold*, did subscribe to the capital stock of said company, in his own name, and as his own property, the whole tract of land as above described, at forty dollars per acre, which subscription was accepted and confirmed by the company. Believing the land, thus subscribed, to be the property of *Williams*, or that he had full authority to sell and convey the same, the company afterward, by her agent, one *E. A. McArthur*, tendered to *Williams*, in stock, issued to him, full payment, at the price agreed on, six thousand four hundred dollars, and demanded of him a conveyance in fee simple. But *Williams* informed said agent that he must first consult *Harpold* in relation to such conveyance; and they, *Williams* and *Harpold*, having consulted together, it was agreed between them, that *Williams* should execute to the company a conveyance for the entire tract, and receive the stock in payment therefor, and that *Harpold*, on presentation, or delivery to him, of one thousand eight hundred dollars of such stock, was to execute to *Williams*, a conveyance in fee for said forty-five acres of land. And in pursu-

The Junction Railroad Company v. Harpold and Another.

ance of the aforesaid agreement and authority, *Williams*, having informed said agent of the assent of *Harpold* to such conveyance, in the manner above stated, did, then and there, execute to the company, and deliver to her agent, a deed in fee simple, for the entire quarter section, and upon the delivery of said deed, *Williams* received and accepted, in full payment for the land conveyed, the capital stock which had been issued in his name, to-wit: one hundred and twenty-eight shares, of fifty dollars each, amounting in the aggregate to six thousand four hundred dollars. It is averred that, afterward, in the year 1857, the company sold the quarter section, above described, to one *Andrew Jackson*, and gave him a bond, conditioned that she would execute to him a conveyance in fee simple, upon payment of the purchase money; but the company has been informed, that *Harpold* claims the legal title to the aforesaid forty-five acres, and refuses to execute to *Williams*, or to the company, any conveyance whatsoever for the same; although *Williams*, in the year 1853, and long before the commencement of this suit, as the company is informed and believes, tendered *Harpold*, duly assigned to him, thirty-six shares of said stock, which, at fifty dollars per share, amounted to one thousand eight hundred dollars, and demanded a deed for the land; and he, *Williams*, is still ready, etc., to deliver said shares of stock, upon the execution of such deed, etc. The relief sought is, that *Williams* be directed to bring the thirty-six shares of stock into Court, to be delivered to *Harpold*; that he be directed to convey the forty-five acres to *Williams*, or to the company; and that the title of the company be quieted, etc.

The defendant, *Williams*, answered, admitting the facts alleged in the complaint. *Harpold*, the other defendant, demurred, but his demurrer was overruled; and thereupon he answered, setting up, *inter alia*, that the agreement between him and *Williams*, whereby he agreed to convey the forty-five acres of land to *Williams*, was not in writing, etc.

The Junction Railroad Company v. Harpold and Another.

Demurrer to the answer overruled, and final judgment given for the defendants.

The only question to settle is: Whether the agreement between the defendants, not being in writing, is inoperative under the Statute of Frauds? The statute says: "No action shall be brought, upon any contract for the sale of lands," unless such contract be in writing, and signed by the party to be charged, etc. 1 R. S., p. 299, sec. 1. The agreement in question seems to be within the statute, because it plainly relates to the sale of real estate. But the appellant contends that *Harpold*, having *stood by*, and allowed his title to be conveyed, is estopped from setting it up in defense of the action. Upon this subject *Mr. Story* thus states the law: "If a man, having title to an estate, which is offered for sale, and knowing his title, *stands by* and encourages the sale, or does not forbid it, and thereby another person is induced to purchase the estate, under the supposition that the title is good, the former, so *standing by*, and being silent, shall be bound by the sale; and neither he, nor his privies, shall be allowed to dispute the purchase." 1 Story's Eq. Jur., sec. 185. See, also, *Gatling v. Rodman*, 6 Ind. 289, and cases there cited. "These principles, however, do not apply, where a party, having the adverse claim, is not apprised of his rights, or where the purchaser knows them to exist, because, in that case, there can be no concealment, nor could the title be deemed a secret." And we are, therefore, led to inquire, whether, in the complaint before us, such concealment is sufficiently alleged. It may be noted, that the complaint contains no direct averment that the plaintiff did not, at the time she purchased the land, have knowledge of *Harpold's* title; and the facts are, that *Harpold*, in the first instance, offered to subscribe his forty-five acres, a portion of the quarter section afterward conveyed, but his offer was rejected. He then requested *Williams* to subscribe, in his own name, and as his own property, the entire quarter,

Kerr *v.* Jones.

which was accordingly done; and further, when the company's agent tendered the stock to *Williams*, and demanded a deed, *Williams* informed the agent, that he must consult *Harpold* in relation to the conveyance, and such consultation having been had, the agent was informed of it, and distinctly told, that *Harpold* assented to the conveyance. These facts at once show that the company, by her agent, was not unapprised of *Harpold*'s legal right to a portion of the land; and that being the case, he is not chargeable with concealing his title. The result is, the contract, whereby *Harpold* agreed to dispose of his land, not being in writing, is within the Statute of Frauds, and can not, therefore, be enforced in this action.

Per Curiam.—The judgment is affirmed, with costs.

Davis and March, for the appellant. ✓

Buckles and Sansbury, for the appellees.

KERR *v.* JONES.

The office of colonel of volunteers, as now existing, and the office of reporter of the decisions of the Supreme Court of *Indiana*, within the meaning of the ninth section of the second article of the constitution of said State, are lucrative offices.

The office of colonel of volunteers in the military service of the *United States*, as now organized, is not an office in the militia.

The acceptance, therefore, of the latter office, by the incumbent of another lucrative office, under the laws of *Indiana*, would vacate the former.

MOTION in the *Supreme Court* for direction to the clerk.

PERKINS, J.—In October, 1860, *Benjamin Harrison, Esq.*, was elected reporter of the decisions of the Supreme Court

Kerr v. Jones.

of *Indiana*, for the term of four years, pursuant to the constitution and statutes of the State.

He accepted the office.

On the 7th of August, 1862, he was commissioned as colonel of the 70th regiment of *Indiana* volunteers, in the army of the *United States*; he accepted the office, and, soon afterward, departed with his command, to enter upon active service, in a remote part of the Union, having, in the meantime, appointed a deputy reporter.

In October following, being last October, *Michael C. Kerr, Esq.*, was elected by the voters of the State of *Indiana*, at the annual State election, reporter, to fill the office assumed to have been vacated by *Mr. Harrison*, on his acceptance of the office of colonel of volunteers, as above stated; and, on the 18th day of November, 1862, said *Kerr* was duly commissioned, as reporter, by the executive of the State.

Soon afterward, *Mr. Kerr* called upon *John P. Jones, Esq.*, the clerk of the Supreme Court, for the records and opinions in decided causes, to enable him to proceed with his duties as reporter, and received from him all that were in his office; but the clerk was not in actual possession of a few of the records and opinions; he had delivered them, in good faith, to *Mr. Caven*, who claimed to be *Mr. Harrison's* deputy. We may here remark, in passing, that we think the office of reporter, one of personal trust, that can not be deputed to another by the incumbent of it, at common law. The duties of the office require honesty, industry, general and legal education, and a quick, clear, and discriminating mind, in their performance. *Mr. Caven* refused to return the records and opinions he had received from *Mr. Jones*, whereupon *Mr. Kerr* moved the Supreme Court for an order upon the clerk to furnish the records and opinions to him, as reporter.

Mr. Caven had not attempted to qualify as deputy, till after *Mr. Kerr* had qualified as reporter.

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If the acceptance of the office of colonel of volunteers, by *Mr. Harrison*, vacated his office as reporter, then he had no power to appoint the deputy in question; *Mr. Kerr* was the lawful reporter, and, as such, was entitled to the use of the records and opinions kept in the office of the clerk of the Supreme Court, and the supposed deputy of *Mr. Harrison* had no right to the possession and use of those records and opinions. It is agreed by the parties, that this question shall be decided in this proceeding.

Our constitution provides, that no person shall "hold more than one lucrative office at the same time," with some exceptions, not embracing the case at bar; and it specifies two classes of offices that shall not be regarded lucrative, viz.: Offices in the militia to which no annual salary is attached, and the office of deputy postmaster, where the compensation does not exceed ninety dollars per year. Art. 2, sec. 9.

On general principles, the office of colonel of volunteers, as now existing, is lucrative, and so is that of reporter of the Supreme Court. *Mr. Harrison* can not hold them both, therefore, unless the office of colonel of volunteers is an office in the militia, within the meaning of the constitution; and if he can not hold them both, his acceptance of the colonelcy, being the later office, vacated that of reporter. 8 Blackf. 329. Is, then, the office of colonel of volunteers, now held by *Mr. Harrison*, an office in the militia?

The Constitution of the *United States* ordains that Congress may: 1. Declare war, make rules concerning captures on land and water, etc. 2. Raise and support land and naval armies, and make rules for their government. 3. Provide for calling forth the militia for specified purposes, and for governing them, etc. Art. 1, sec. 8. These things must be done by Congress, the legislative power.

The President of the *United States* is: 1. The commander-in-chief of the army and navy of the *United States*. 2. The commander-in-chief of the militia of the several States,

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when called into the actual service of the *United States*.
Art. 2, sec. 2.

It thus appears, that the Constitution of the *United States* divides the military land forces of the Union into two classes, and no more, viz.: 1. The army of the *United States*. 2. The militia.

It vests the President with no power in the premises, except, simply, with that of being commander-in-chief of the forces, after they have been brought into service.

The President has not, by the Constitution, power to raise a single soldier. Congress, the legislative power, can alone empower him to do so; and he can not, in any case, go beyond the limits, in the matter, prescribed by Congress; because he can not perform an act of legislation. The Constitution declares, that "all legislative power," granted to any one, by the Constitution, shall be vested in Congress.
Art. 1, sec. 1.

Congress has power, then, by the Constitution, to do two things, among others, viz.: 1. To raise an army of the *United States*. 2. To provide for calling out the militia.

The Constitution does not prescribe the mode of raising the "army of the *United States*," nor describe or define the persons of whom it shall be composed, nor fix its size, nor require that it shall be, at all times, of the same size, nor that it shall be all raised by the same mode. But it does indicate the mode in which the militia is to be brought into service. It is to be "called forth;" brought out by compulsion; and it is, of course, a defined class of men.

Congress, in its wisdom, has proceeded to raise an army, and to provide for "calling forth" the militia; and thus has drawn the line between the two descriptions of force.

The army is raised by voluntary enlistments.

The militia is called forth.

Since the 4th of March, 1861, Congress has passed several acts, authorizing the President "to accept the services of

Kerr *v.* Jones.

volunteers," for three years, or during the war; and to these, bounties, etc., are allowed, whether they enlist in what is technically called the regular service, or in the volunteer branch of the army of the *United States*. See *Acts of the called session*, pp. 21, 24, 31.

The Congress has, also, during the same period, passed acts for "calling forth the militia;" but in these acts, no bounties, etc., are allowed to the militia, and the time for which the President can compel them to serve, is less than a year. See *Acts of the called session*, p. 33; and, in connection therewith, Brightly's *Digest*, p. 621.

The last authority given to the President, to call forth the militia, was by *Act of Congress of the 17th of July, 1862*, which is in these words, (*Acts of 1862*, p. 597):

"That whenever the President of the *United States* shall call forth the militia of the States, to be employed in the service of the *United States*, he may specify in his call the period for which such service will be required, not exceeding nine months; and the militia, so called, shall be mustered in, and continue to serve, for and during the term so specified, unless sooner discharged, by the command of the President. If, by reason of defects in existing laws, or in the execution of them, in the several States, or any of them, it shall be found necessary to provide for enrolling the militia, and otherwise putting this act into execution, the President is authorized, in such cases, to make all necessary rules and regulations; and the enrollment of the militia shall, in all cases, include all able-bodied male citizens between the ages of eighteen and forty-five, and shall be apportioned among the States, according to representative population."

Acts of Congress take effect from their passage. 1 *Shars. Blackstone*, p. 46, note. This statute, defining what were militia in the present service of the *United States*, was in force when *Mr. Garrison* was commissioned colonel. He was not commissioned in that force, but in the volunteer service

The State, on the Relation of *Leal v. Jones*.

for three years, or during the war, and he is a colonel in the army of the *United States*. At all events, he is not a colonel of the "militia."

It may be observed, that we should, probably, be bound to give *Mr. Kerr* the records, upon the commission of the Governor. See, as to further positions discussed in this case, *The State, ex rel. Leal v. Jones*, at this term. See next case.

Per Curiam.—The motion upon the clerk, to deliver the records to *Mr. Kerr*, is granted.

Thomas L. Smith and *M. C. Kerr*, for the plaintiff.

David McDonald, and *Fishback and Caven*, for the defendant.

19	355
124	556
19	356
128	130
19	356
150	425

THE STATE, on the Relation of *Leal v. Jones*.

An election for county Auditor is not void by reason of an omission to give public notice that it would take place.

Where it appears, *prima facie*, that acts, or events, have occurred, subjecting an office to a judicial declaration of being vacant, the authority having the power to fill such vacancy, supposing the office to be vacant, may proceed, before procuring a judicial declaration of the vacancy, to appoint, or elect, according to the forms of law, a person to fill such office.

But if, when such person attempts to take possession of the office, he is resisted by the previous incumbent, he will be compelled to try his right by an application to the proper courts.

But, if he finds the office, in fact, vacant, and can take possession, uncontested by the former incumbent, he may do so, and so long as he remains in such possession, he will be an officer *de facto*, and, should the former incumbent never appear to contest his right, he will be regarded as having been an officer *de facto* and *de jure*.

And, if such former incumbent should appear, after possession has been taken against him, the burden of proceeding to oust the actual incumbent would rest upon him, and if it should then

The State, on the Relation of *Leal v. Jones*.

appear, that, before the appointment, or election, of such incumbent, facts had occurred justifying a judicial declaration of a vacancy, it will then be declared to have existed, and such appointment, or election, held valid.

APPEAL from the *Dearborn Common Pleas*.

PERKINS, J.—In July, 1861, *Elias T. Crosby* was auditor of *Dearborn county, Indiana*. On the 17th day of that month, he abandoned the office and removed from the State.

At the annual election, in October following, *William Leal* became a candidate for the office of auditor of *Dearborn county*, and received eleven hundred and twenty-eight votes, being the highest number cast for a candidate for that office; but the clerk of the Circuit Court of the county, *Samuel L. Jones*, refused, within twenty days, and still refuses, to certify the vote for the candidates for the office of auditor, at said election, though there was no contest, to the Secretary of State, whereby the relator was prevented from obtaining a commission for the office to which he claims to have been elected. This suit was instituted to obtain a mandate, compelling the clerk to make and transmit the certificate.

A demurrer to the complaint was sustained, and the mandate refused, on the two grounds, that no notice of the election for an auditor of the county was given, and that there was no vacancy capable of being filled at the election.

It was the duty of the clerk to certify the votes to the Secretary of State; 1 G. & H., p. 312, sec. 38; and this without regard to the legality of the election. The duties of the clerk are ministerial, not judicial. *Brower v. O'Brien*, 2 Ind. 428. 1 G. & H. 306, note. Still, where it is manifest that the election held was void, a Court will not compel a ministerial officer to perform a useless act. *Beal v. Ray*, 17 Ind., p. 554. Same case, 18 Ind., p. 346. Is it so manifest in this case?

The election for auditor was not void by the omission to give notice that it was to take place. *The People v. Cowles*, 8 Kernan, 350.

The State, on the Relation of Leal v. Jones.

The election may have been valid, if the office had been vacant twenty days, or upward, at the day of the election. We say it may have been, not that it necessarily was; circumstances may control the validity of any election.

Does the complaint, in this case, then, show, *prima facie*, that a vacancy existed in the office of county auditor, of Dearborn county, twenty days before the annual October election for 1861? A vacancy may so occur in an office as to require it to be filled at a succeeding annual election, by the acceptance, by the incumbent, of another incompatible office. Ind. Dig. 599. By the expiration of the current term of the incumbent. *Biddle v. Willard*, 10 Ind. 62. By the death of the incumbent. 3 Kernan, *supra*; see *The State v. Pidgeon*, 8 Blackf. 132. By the removal of the incumbent, from the office, by legal proceedings. By the voluntary removal of the incumbent, living, from the township, county, or State, as the case may be; and this without a judicial declaration of the vacancy. This is expressly ruled in *Hadley v. The Board, etc.*, 4 Blackf. 116, as we understand that case. The constitution and statutes of the State require county officers to be residents, and to attend to their duties at the county seat.

We think the demurrer should have been overruled, and the defendant required to answer. An additional observation or two may be justified.

We think the following propositions are deducible from the judicial decisions of the Supreme Court of Indiana:

1. Where it appears, *prima facie*, that acts or events have occurred subjecting an office to a judicial declaration of being vacant, the authority authorized to fill such vacancy, supposing the office to be vacant, may proceed, before procuring a judicial declaration of the vacancy, and appoint or elect, according to the forms of law, a person to fill such office; but if, when such person attempts to take possession of the office, he is resisted by the previous incumbent, he

Johnson *v.* Houghton.

will be compelled to try the right, and oust such incumbent, or fail to oust him, in some mode prescribed by law. 2. If such elected or appointed person finds the office, in fact, vacant, and can take possession, uncontested by the former incumbent, he may do so, and so long as he remains in such possession, he will be an officer *de facto*; and should the former incumbent never appear to contest his right, he will be regarded as having been an officer *de facto* and *de jure*; but should such former incumbent appear, after possession has been taken against him, the burden of proceeding to oust the then actual incumbent, will fall upon him; and if in such proceeding it is made to appear that facts had occurred before the appointment or election justifying a judicial declaration of a vacancy, it will be then declared to have existed, and the election or appointment will be held to have been valid. See 5 Ind. on p. 91, in addition to authorities cited.

Per Curiam.—The judgment is reversed, with costs. Cause remanded for further proceedings.

D. S. Major, for the appellant.

McDonald and Roache, for the appellee.

JOHNSON *v.* HOUGHTON.

19	259
159	411
159	412

On the assignment of a land office certificate of the location of land, there is no implied warranty of title.

In a matter embracing neither fraud nor covenant, the purchaser acts at his own risk, and voluntarily foregoes any remedy, if the title should fail. The rule, *caveat emptor*, applies.

Where a transfer of real estate, or any interest therein, is defective in form, the transferee can not, for that reason alone, recover back

Johnson v. Houghton.

the money paid therefor, but must first demand a correction of the error in the transfer.

A contract can not, either for mistake or fraud, be rescinded in part, and affirmed in part, but must be rescinded *in toto*, or not at all.

APPEAL from the *De Kalb* Circuit Court.

WORDEN, J.—On the 2d of April, 1859, *Nathan Johnson* sold and conveyed to *Obadiah C. Houghton* and *Amos B. Park* certain real estate, in *De Kalb* county, for the consideration, as stated in the deed, of thirty-two hundred dollars. Some money was paid in part for the consideration, and, among other things, *Johnson* took from *Houghton* an assignment of a land-office certificate of location, but for what amount the certificate was received the record does not disclose. The title to the land, covered by the certificate, failed, and *Johnson* brought this suit against *Houghton*, to recover the value of the land named in the certificate. Trial by the Court; verdict and judgment for the defendant.

The certificate in question, and the assignment thereon, are as follow:

“Military bounty land, act of March 3, 1855, register's office, *Plattsburg*, July 30, 1857.

“Military land warrant, No.—, in the name of—— has this day been located by *Obadiah C. Houghton*, upon the s. $\frac{1}{4}$ of s. w. $\frac{1}{4}$ of section 22, and n. w. $\frac{1}{4}$ of n. w. quarter of section 27, in township 64, of range 28, subject to any pre-emption claim which may be filed for said land, within forty days from this date. Contents of tract located, 120 acres.

“W. TURNER, *Register*.”

(ASSIGNMENT.)

“For value received, I, *Obadiah C. Houghton*, to whom the within certificate of location was issued, do hereby sell and assign unto *Nathan Johnson*, and to his heirs and assigns forever, the said certificate of location, and the warrant and

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land therein described, and authorize him to receive the patent therefor. Witness my hand and seal, this 2d day of April, 1859. "OBADIAH C. HOUGHTON, [seal.]"

This assignment was duly acknowledged before a notary public.

It was agreed upon the trial, that the land embraced in the certificate lay in the State of *Missouri*; that it was pre-empted by one *George W. Kelly*, previous to the 30th of July, 1857, in whose possession it has been ever since, and that the Government has approved his pre-emption; that at the time of the assignment neither the plaintiff nor the defendant had any actual notice that the land had been pre-empted, or that any other person had any claim to it; that at the date of the assignment the land was worth four hundred and fifty dollars, and that the warrant upon which the location was made was worth one hundred dollars.

It was also shown by the evidence, that, pending the negotiations, *Houghton* declined to give any warranty for the land, or make a warranty deed, saying that he knew nothing about it, except what appeared on the certificate. Before this suit was commenced, *Johnson* executed a reassignment of the certificate to *Houghton*, and tendered it back to him.

These are believed to be the material facts of the case.

The principal question in the case is, whether any implied warranty of title to the land attaches to the assignment? We think not. There are several reasons which, taken conjointly, if not separately, render it clear that no warranty of title can be implied. There are no covenants in the assignment. The assignment is a completely executed contract. Nothing remains to be performed *in futuro*. Now, had the paper been a regular deed of conveyance, without covenants, instead of an assignment of the certificate, it is abundantly clear that the failure of title would have furnished no ground to recover back the purchase money, if

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paid, or defense to an action to recover it, if unpaid. Rawle on Cov., p. 614, (3d ed.). *Laughery v. McLean*, 14 Ind. 106. In the latter case, it was said, that "the maxim of *caveat emptor* peculiarly applies in such case. The defendant in error should have taken proper covenants to guaranty his title. In a matter embracing neither fraud nor covenant, the purchaser acts at his own risk, and voluntarily foregoes any remedy, if the title should fail." The principle is equally applicable to the assignment in question.

But, beyond this, the certificate shows on its face, that the rights of the holder were subject to any pre-emption claim that might be filed for the land, within forty days from its date. *Johnson* received the certificate, subject to the contingency. When he bought the certificate, he was notified by the terms of it, that a contingency might arise, which would defeat the location. That contingency, it seems, did arise, and it would seem that he should not now be heard to complain of it. But, still further, it appears that both parties were ignorant of the pre-emption claim. *Houghton* did not profess to know anything about the matter, except from the certificate. He refused to make any warranty. This shows, clearly enough, that *Johnson* bought upon his own risk. Under such circumstances, an express warranty being refused, it would be an anomaly if the law would imply one. If any analogy is supposed to exist between this case and that of a sale of personal property, that analogy favors the defense, for in the case of a sale of chattels, not in the possession of the seller, the law does not imply a warranty of title. *Lackey v. Stouder*, 2 Ind. 876. Here, the land was not in the possession of *Houghton* at the time of the assignment.

But it is claimed that the assignment is void, not being in conformity to the acts of Congress, and, therefore, that the plaintiff is entitled to recover. It is claimed, that two witnesses are necessary to attest an assignment. The act

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of March, 1852, (*vide* U. S. Stat. at large, p. 3, vol. 10,) provides, "That all warrants for military bounty lands, which have been, or may hereafter be issued, under any law of the *United States*, and all valid locations of the same, which have been, or may hereafter be made, are hereby declared to be assignable, by deed or instrument of writing, made and executed after the taking effect of this act, according to such form, and pursuant to such regulations, as may be prescribed by the Commissioner of the General Land Office, so as to vest the assignee with all the rights of the original owner of the warrant, or location."

We are not apprised whether the forms and regulations prescribed by the commissioner, as above provided for, require attesting witnesses to an assignment. Nothing on this subject has been shown. The assignment in question being sufficient, on general principles, and *Johnson* having received it, we think it devolves upon him to show that it is not in accordance with the forms and regulations prescribed, if such be the fact. He, having shown nothing on this subject, can not say that the forms and regulations have not been complied with. But there is another conclusive answer to this position. Suppose the assignment is not in accordance with the forms and regulations prescribed, *Johnson* could not, for that reason only, recover of *Houghton* the value of the land, without, at least, having first required him to execute an assignment in accordance with those forms and regulations. Suppose that, at a time when a seal was necessary to a conveyance, A should have sold to B a piece of land, and executed a conveyance, regular in every respect except that the sealing was accidentally omitted, can B, thereupon, sue A for the price of the land, without first demanding a correction of the mistake? We think not. Indeed, his only remedy might be a proceeding to compel such correction. So here, if the assignment lacks any of the requirements of the rules and regulations, *Johnson*

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should have applied to *Houghton* to correct the error, before bringing suit for the value of the land.

It is also urged, that there was a mutual mistake, in both parties, as to the title, which would justify a rescission. *Martin v. McCormick*, 4 Seld. 331, is a strong case, tending to uphold this view. But we doubt whether, in view of the whole case, the mistake, as to the title, was such an one as to justify a rescission. On the supposition, however, that the mistake would justify a rescission, still, *Johnson* has not put himself in a position to rescind. Indeed, he is not trying to rescind the contract. A contract can not, for either mistake or fraud, be rescinded in part, and affirmed in part. It must be rescinded *in toto*, or not at all. *Rinker v. Sharp*, 5 Blackf. 185. *Gatling v. Newell*, 9 Ind. 572. Here, *Johnson* retains the money and whatever other consideration he received for the land conveyed by him to *Houghton* and *Parks*, and seeks to recover the value of the land covered by the certificate of location. The suit, in short, is not based, at all, upon the supposed right to rescind the contract.

There is no error in the record, hence the judgment must be affirmed.

Per Curiam.—The judgment is affirmed, with costs.

J. A. Fay, for the appellant.

W. H. Withers and *John Morris*, for the appellee.

MURRAY and Another v. MOUNTS and Another.

Where the widow of a decedent is in the possession and control of his real estate, and leases the same for a stipulated rent, and before the rent becomes due, under the terms of the lease, such real estate is partitioned between the widow and other heirs of the decedent, the tenant is only accountable to the said widow and

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heirs, respectively, for the rent, in the proportions in which they severally take the real estate, and not to the widow for the whole.

APPEAL from the *Bartholomew* Common Pleas.

HANNA, J.—Suit on an agreement for the payment of rent for the use of a tract of land during the year 1860; averment of non-payment.

Judgment for the defendants.

The parties agreed to a statement of facts, upon which the Court found for the defendants, in substance, as follows: “The execution of the agreement was admitted, and that *Mounts* took possession of and cultivated the land, under the said agreement, but had not paid part of the rent reserved, because, at the time the land was rented to him, by said female plaintiff, she was in possession thereof, as the widow of one *Adams*, who died in possession, leaving her in possession, in 1857, and who had, before then, to wit, in 1846, executed a deed, without his said wife joining therein, to his two daughters; that, at the May term, 1860, of said Court, one of said daughters applied for partition of said lands, claiming that she was entitled to one-half of the same, and her sister to the other half, subject to the widow’s dower. The plaintiffs herein, answered, and admitted the facts stated, and asked that the widow’s dower be set off. The other sister, being a non-resident, was notified by publication. The Court, at said term, ordered partition, etc., in accordance with said petition and cross-petition, and appointed commissioners, whose report was, at the September term, confirmed; that *Mounts* paid the plaintiffs the amount of rent due on the part set off to the widow, and paid the daughter who applied for partition, the rent for the part set off to her, and refused to pay for the balance of the land set apart to the absent daughter, being about fifty dollars, because of the want of authority in the plaintiffs, to receive the same.”

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By the contract, the rent was to be paid on the 25th day of December, 1860.

Should the plaintiffs have recovered on these facts; and, if yea, were the pleadings in a condition to authorize a judgment?

It has been held, that the heirs, not the widow, have the right to control real estate, (except as named in the statute,) upon the death of the ancestor, until dower, when dower is assignable, has been set apart. *Williamson v. Ash*, 7 Ind. 495. But, by sec. 17, p. 250, 1 R. S., it is provided, that, under certain circumstances, one-third of the real estate of a deceased husband shall descend to the widow. It has been held, under this, that she takes, as heir of her husband. *Frantz v. Harrow*, 13 Ind. 508. *Johnson v. Lybrook*, 16 *Id.* 474. Sec. 110, p. 273, 2 R. S., gives the administrator, if there is "no heir or devisee" present, etc., the right to take possession, and receive rents, etc.

It is thought that, perhaps, any one heir might take possession, in behalf of himself and all others. The widow, as before noticed, is an heir.

The facts in this case, admitted, show that the deceased was in possession at the time of his death, and left the widow in possession, who held the same until the partition named.

Whether the widow, or any other one heir, where there are several, can legally take possession of the whole, and lease and receive rents therefor, is a question we need not look into, because it is shown, that at the time of the partition, the rents reserved had not accrued, became due, by the contract; that the widow had received the portion due upon the part set apart to her; consequently, her right to control the balance of the real estate, and receive rents therefor, ceased, and the tenant was accountable to others for said occupancy. *Page v. Lashley*, 15 Ind. 153. That the tenant could show that fact, see *Kinney v. Doe*, 8 Blackf. 350; *Casey v. Gregory*, 13 B. Mon. 507.

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This may be, and, perhaps is, in conflict with the case of *Life v. Secrest*, 1 Ind. 512, unless the latter can be sustained on the ground that the administrator had authority, under the statute, to rent lands, and appropriate the rents to the discharge of debts.

Per Curiam.—The judgment is affirmed, with costs.

William Singleton, for the appellants.

Francis T. Hord, for the appellees.

10	367
125	61
19	367
161	120/

STEPHENS and Others v. BENSON.

The case of *Snowden et al. v. Wilas et al.*, in this volume, followed.

Suit for overflowing land. The defendant answered, setting up an unsealed and unacknowledged, but signed and recorded, contract in writing, made between the plaintiff's grantor and others, and the defendants, as follows: "Whereas, A, B, and C, contemplate erecting a dam across the *Tippecanoe river*, about six miles below *Win-nemac*, near B's, on, etc., in section 9, etc., and contemplate the erection of mills below said dam, to the hight of six feet; and whereas, we, the occupants and owners of lands adjoining and contiguous to said proposed dam, and to the river above said dam, likely to be affected by back-water from said project, and erection of such proposed mills, of public utility; therefore, to encourage the said A, B, and C, in such undertaking, we do hereby assent and agree, that said men, or any of them, or their substitutes, or assigns, or heirs, may erect such dam, to the hight aforesaid, and for ourselves, and heirs, and assigns, do waive and release all damages that may ensue from the erection of such dam, and from back-water caused by the dam;" and further averred, that, under it, the dam and mills, costing thirteen thousand dollars, were erected; that one thousand dollars had been expended on the dam at the

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time the plaintiff purchased the land; that he had notice, and stood by and saw said expenditures, and paid one thousand five hundred dollars, etc., of said purchase money, after said work was completed, etc.

Held, that said answer set up a good bar to the action.

APPEAL from the *Pulaski* Circuit Court.

HANNA, J.—Suit for overflowing lands by the erection of a mill-dam.

Answer. Setting up an unsealed, unacknowledged, but signed and recorded instrument in writing, made by *Hall*, the grantor of *Benson*, the plaintiff, as follows:

“Whereas, *John Stephens, James C. Shultz, and Don. Short*, contemplate erecting a dam across the *Tippecanoe river*, about six miles below *Winnemac*, near *Esquire Brown's*, on lots Nos. 3 and 6, in section 9, township 29, north, of R. 2, west, and contemplate the erection of mills below said dam, to the hight of six feet; and whereas, we, the undersigned, the occupants and owners of lands adjoining and contiguous to said proposed dam, and to the river above said dam, likely to be affected by back-water from said project, and erection of such proposed mills, of public utility, therefore, to encourage the said *Stephens, Shultz, and Short*, in such undertaking, we do hereby assent and agree, that these gentlemen, or any of them, or their substitutes, or assigns, or heirs, may erect such dam to the hight aforesaid, (six feet,) and for ourselves, and heirs, and assigns, do waive and release all damages that may ensue from the erection of such dam, and from back-water caused by the same. Nov. 22, 1849.”

It is averred that, under it, the dam and mills, costing thirteen thousand dollars, were erected; that one thousand dollars of said expense had been incurred on said dam, at the time the plaintiff purchased of *Hall*; that he had notice, and stood by and saw said expenditures, and paid fifteen

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hundred dollars, etc., of said purchase money, after said work was completed, etc.

A demurrer was sustained to this answer, which ruling raised the only point presented in the case.

It is urged, that the instrument set out is a direct, positive grant of an incorporeal hereditament, and operative, under the statute of March 1, 1855, and that of December 23, 1858, notwithstanding that of and concerning real property; 1 R. S., p. 233; as between the parties, and their privies by blood or purchase.

The instrument is not a grant, but is more in the form of a license to do certain things, which might affect the interest of the person giving said license.

The next question is, whether, in view of the statute requiring the conveyance of land, or any interest therein, to be by deed, acknowledged, etc., the writing herein is void, or otherwise, as against the grantees of said land. Perhaps the instrument was intended to possess the persons, therein named, of an interest in said lands; let it be termed a servitude, an easement, or an incorporeal hereditament, it matters not which. It was intended to give the right to flow the said lands, if the erection of the dam would do so. It is sufficiently shown in the answer, that the defendants expended money, upon the faith of said license, with the knowledge of said plaintiff, to bring this case within the reasoning in that of *Snowden et al. v. Wilds et al.*, at this term: and for said reasons it is reversed.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

D. D. Pratt, for the appellants.

Crawford and Others *v.* Martin.

CRAWFORD and Others *v.* MARTIN.

On an appeal, from a judgment of an inferior Court, for a refusal to grant a new trial on the ground of newly-discovered evidence, the record should contain the evidence given on the trial below, in order that this Court may be able to determine, whether the newly-discovered evidence, if admitted on another trial, would produce a different result; otherwise, this Court will not reverse the judgment below.

APPEAL from the *Rush* Common Pleas.

Per Curiam.—*Martin*, who was the plaintiff, sued *John Foster*, *William Crawford*, *Margaret Frazier*, and *Joseph Hamilton*, in replevin, to recover a brick-kiln. *Foster* was defaulted. The other defendants appeared and answered: 1. By a denial. 2. Property in themselves, etc. The issues were tried by the Court, who found for the plaintiff, and judgment was, accordingly, rendered, etc. The record shows that, at that, the October, term of said Court, in the year 1858, being the term next after the trial and judgment, *Crawford* and *Frazier*, two of the defendants, moved for a new trial, on two grounds: 1. That the decision is unsustained by the evidence. 2. That they, the defendants, “have newly-discovered evidence, material for them, which they could not, with reasonable diligence, have discovered and produced at the trial.” The latter-assigned cause is sustained by an affidavit, which points out, specifically, the newly-discovered evidence; but the evidence given on the trial is not in the record before us, and we are, therefore, unable to say, whether the new evidence, if allowed on another trial, would produce a different result. *Simpson v. Wilson*, 6 Ind. 474. *Hull v. Kirkpatrick*, 4 Ind. 637. The second alleged ground is not, therefore, sufficient cause for a new trial. And the first ground, viz.: “That the decision is unsustained by the evidence,” is equally unavailing,

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because the evidence, as we have seen, is not before us; and, moreover, that cause can not be assigned after the term at which the trial was had.

The judgment is affirmed, with five per cent. damages, and costs.

R. L. Walpole and S. W. Robinson, for the appellants.

L. Sexton, for the appellee.

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EATON and Others *v.* ACTON and Another.

This Court will not disturb the judgment of a Court below, where it is not manifestly wrong, and the evidence tends to sustain it.

APPEAL from the Daviess Circuit Court.

Per Curiam.—This was an action by the appellees, who were the plaintiffs against *Samuel H. Eaton* and *William Wilson*, to foreclose a mortgage on real estate in Daviess county. The complaint alleges these facts:

On the 11th of October, 1860, the defendant, *Wilson*, by his promissory note of that date, promised, on or before the 25th of December, 1861, to pay to the order of one *Josiah Mongor*, seven hundred and seventy-seven dollars, for value received. This note was given for a part of the purchase money of said real estate, which was, at the time it was given, sold and conveyed by *Mongor* to *Wilson*, and, in order to secure the payment of the note, *Wilson* executed the mortgage to *Mongor*, who assigned it to the plaintiffs. After the execution of the mortgage, and before the assignment thereof, viz.: on the 20th of March, 1861, *Wilson*, the mortgagor, sold, and, by deed in fee, conveyed the mortgaged premises to the defendant, *Samuel H. Eaton*, which deed was duly recorded on the 8th of April, then next ensuing;

Eaton and Others v. Acton and Another.

but the mortgage was not recorded until the 24th of February, 1862. It is, however, averred, that *Eaton*, at the time he purchased the land, and long previous thereto, had full and actual notice of the existence of the mortgage, and of its lien on said land, etc. *Wilson*, one of the defendants, was defaulted; *Eaton* appeared and answered: 1. By a denial. 2. That *Mongor*, after he received the mortgage, left it with *Wilson*, the alienee and mortgagor of the land, as his agent, with instructions to him, *Wilson*, as such agent, to sell the same land, to enable him to pay the note; and further, he, *Mongor*, instructed his said agent, that, if he could sell, before the mortgage and note matured, then, and in that case, the mortgage was not to be recorded, and was to be held canceled, and fully discharged; and the defendant avers, that, on the 21st of March, 1851, he purchased the land, described in the mortgage, of *Wilson*, the aforesaid agent, for a valuable consideration, to-wit: the sum of one thousand five hundred dollars, without any notice, whatever, of said mortgage, except as aforesaid, etc.

The plaintiffs replied, by a general denial, and, also, specially, as follows:

That *Eaton* purchased the real estate described in the mortgage of *Wilson*, with full knowledge of the existence of the mortgage, and of the lien upon the land, etc.

The Court tried the issues, and found for the plaintiffs; and having refused a new trial, rendered judgment, etc.

The record contains the evidence, and the only question to be considered is, Does the evidence sustain the finding? The weight of it is, that *Eaton*, when he purchased, had notice of the existence of the mortgage, but in relation to the other point, viz.: Whether *Mongor* instructed *Wilson* to sell the land, it is very conflicting. It was, however, for the Court, sitting as a jury, to weigh the evidence, and reconcile the conflict. And, its conclusions, in this instance, not being manifestly wrong, we are not inclined to disturb the findings.

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The judgment is affirmed, with costs and two per cent. damages.

R. A. Clements, Sen., for the appellant.

BROWN v. EWING and Others.

Judgment on an agreed statement of facts, substantially, as follows:

The land in controversy is part of ten sections reserved to A, an *Indian*, by treaty, in 1832, between the *United States* and the *Potawattamie Indians*. The lands were to be selected under the direction of the President. A died in 1834, leaving two children and heirs, B and C, who conveyed to the plaintiff's vendors. In 1838 the selections of lands were made, and patents issued to A, which, it is conceded, vested the title in the plaintiff's vendors, and it is conceded that the plaintiffs have title, unless their vendors divested themselves of title by the following agreement, entered into between them and D, the commissioner appointed to make the locations, to-wit: "Agreement between E and F, and G and H, of the first part, and D, of the second part, witnesseth, that, whereas, said parties have conflicting claims upon ten sections of land, reserved, in 1832, by treaty, to A, now deceased, and the same having been inherited by his two sons, B, the elder, and C, the younger, brother. The said E and F, and G and H, of the first part, relinquish and abandon all claim which they have upon the undivided half of said ten sections, inherited by said C, the younger brother; and the said D, the second party, on his part, in like manner, relinquishes and abandons all claim which he has upon the undivided half of said ten sections, inherited by said B, adult heir of said A. For the purpose of effecting a division of said sections, the following agreement is consented to by said party of the first part, and said party of the second part, provided and conditioned, that the same shall be confirmed and approved by the proper court, or courts, having jurisdiction thereof, when legal partition and division thereof shall be made, to-wit:" Here

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follow the stipulations as to the division, specifying the land in controversy, among others, to be taken as the share of said C, and by the terms of the agreement to go to D. The agreement then proceeds: "Said parties mutually agree to ask and solicit said court, in a reasonable time, to confirm the aforesaid partition, or to have commissioners appointed to make partition thereof according to law. The considerations of this agreement are a compromise and settlement by mutual relinquishment, as aforesaid, of the parties' conflicting claims upon said ten sections, the conditions and stipulations aforesaid, and six hundred dollars, secured to be paid by said D, to said party of the first part." Signed. It was further agreed, that, after the execution of the above instrument, D executed a conveyance of the land in controversy to the defendant, and that he, D, has since died; and also, that the sole consideration for the execution of the above agreement was another agreement, executed by D concurrently therewith, which is also set out, but need not be copied here. This last-mentioned agreement, signed by D, recites that he had been appointed locating commissioner, and that he was satisfied that E, F, and others, naming them, were purchasers and owners of certain reservations; it then proceeds to make the locations, and then stipulates, among other things, as follows: "All of which said selections, and locations, I will report to the proper land-officers, and will, if no legal objections to the same are found to exist, then report the same to the Secretary of War, or the President of the *United States*, and desire the same confirmed; or, should such objections be raised as prevent the confirmation of these selections, then the said persons interested may select other lands, which I will report, etc.; nor will I allow any other person or reservee to interfere with the selections these individuals make, but will see that their selections are confirmed," etc.

Held, that the contract and facts set out did not constitute an executed, but merely an executory agreement; and that, in determining whether the agreement should be held to be executed or executory, the facts, that it was not under seal, and contained no words of inheritance, together with its other provisions, were entitled to consideration.

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APPEAL from the *Kosciusko* Circuit Court.

WORDEN, J.—Suit by the appellees against *Brown*, to recover a quarter section of land. Finding and judgment for the plaintiffs. The cause was submitted on an agreed statement of the facts.

The following are the material facts agreed upon: The land in controversy is a part of the ten sections reserved to *Aub-bee-naub-bee*, by the treaty of the 27th of October, 1832, between the *United States* and the *Pottawattamie Indians*. These lands were to be selected under the direction of the President of the *United States*. Sec. 7, U. S. Stat. at large, p. 399. The reservee, *Aub-bee-naub-bee*, died in the year 1834, leaving two children and heirs, called *Paw-koo-shuck* and *Shaw-gowk-shuck*, who conveyed to the plaintiffs' vendors. In 1838, the selection having been made, a patent issued to *Aub-bee-naub-bee*, which, it is conceded, vested the title in the plaintiffs' vendors; and, it is conceded, that the plaintiffs have title, unless their vendors divested themselves of title by the following agreement, entered into between them and *John T. Douglass*, the commissioner appointed to make the locations. The agreement is as follows, viz.:

“Agreement, between *Ewing, Walker & Co.*, and *A. Hamilton & Co.*, of the first part, and *John T. Douglass* of the second part, witnesseth, that, whereas, the said parties aforesaid, have conflicting claims upon ten sections of land, reserved in the treaty of the *Tippecanoe*, of the 27th of October, 1832, to *Aub-bee-naub-bee*, now deceased, and the same having been inherited by his two sons, to-wit: *Paw-koo-shuck*, the eldest, and *Shaw-gowk-shuck*, the youngest brother. The said *Ewing, Walker & Co.*, and the said *Allen Hamilton & Co.*, of the first part, as aforesaid, relinquish and abandon all claim which they have upon the undivided half of said ten sections, inherited by said *Shaw-gowk-shuck*, younger brother, as aforesaid, and the said *John T.*

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Douglass, party of the second part, as aforesaid, on his part, in like manner relinquishes and abandons all claim which he has upon the undivided half of said ten sections, inherited by said *Paw-koo-shuck*, adult heir of said *Aub-bee-naub-bee*, as aforesaid. For the purpose of effecting a division of said ten sections, the following arrangement is consented to by said party of the first part, and said party of the second part, provided and conditioned, that the same shall be confirmed and approved by the proper Court, or Courts, having jurisdiction thereof, when legal partition and division thereof shall be made, to-wit:” Here follow the stipulations as to the division, specifying the land in controversy, among others, to be taken as the share of *Shaw-gowk-shuck*, and by the terms of agreement, to go to *Douglass*. The agreement then proceeds: “said parties mutually agree to ask and solicit said Courts, in a reasonable time, to confirm the aforesaid partition, or to have commissioners appointed to make partition thereof according to law. The considerations of this agreement are a compromise and settlement by mutual relinquishment, as aforesaid, of the parties’ conflicting claims upon said ten sections of land, the conditions and stipulations aforesaid, and six hundred dollars, secured, to be paid by said *John T. Douglass*, to said party of the first part. In testimony whereof, the said parties have hereunto subscribed their names, this 16th day of October, A. D. 1886.

“*Ewing, Walker & Co.*,

“*A. Hamilton & Co.*,

“*John T. Douglass.*

“*Logansport, Ind.*

“*Attest:*

“*George P. Smith,*

“*J. H. Kintner.*”

It was further agreed, that after the execution of the above instrument, *Douglass* executed a conveyance of the land in controversy to the defendant, and that he, *Douglass*, has since deceased. It is, also, agreed, that the sole consid-

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eration for the execution of the above agreement, was another agreement executed by *Douglass* concurrently therewith, which last-mentioned agreement is also set out, but need not be copied in this opinion. This last-mentioned agreement, signed *Douglass*, recites, that he had been appointed locating commissioner, and that he was satisfied that *Ewing*, *Walker*, and others, naming them, were purchasers and owners of certain reservations; it then proceeds to make the locations, and then stipulates, among other things, as follows:

"All of which said selections and locations I will report to the proper land-officers, and will, if no legal objections to the same are found to exist, then report the same to the Secretary of War, or the President of the *United States*, and desire the same confirmed; or should such objections be raised as prevent the confirmation of these selections, then the said persons interested may select other lands, which I will report, etc.; nor will I allow any other person or reservee to interfere with the selections these individuals make, but will see that their selections are confirmed, etc."

It is claimed, that the transaction amounts to this: that *Douglass*, as locating commissioner, made certain favorable locations, and agreed to report them to the proper department, and recommend their confirmation, in consideration of which, the parties of the first part to the agreement agreed to release to *Douglass* one-half of the land reserved to *Aub-bee-naub-bee*, under the assumption that *Douglass* had a conflicting claim; that this agreement was contrary to public policy, and, therefore, utterly void. If this was the character of the transaction, the agreement would seem to be void.

It is laid down, that "all secret agreements, which are founded upon violations of public trust or confidence, are void. Where, therefore, a person occupying a public office agrees, for a reward, to exercise his official influence in

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questions affecting both public and private rights, so as to bring about the private advantage of persons interested, the contract would be void." 1 Story on Con., p. 705, sec. 576.

But, if such be the case, the parties would seem to be in *pari delicto*. If the agreement in question be deemed to be an executed one, whereby the title to the land in question passed from the parties of the first part to *Douglass*, a Court, it would seem, would not lend its aid, either to them, or their vendees, to get rid of the conveyance thus made. If, on the other hand, the agreement be deemed *executory* merely, the Court would not lend its aid, either to *Douglass*, or his vendees, to enforce it. The law would not, probably, lend its aid to either party, but leave them where it found them. *Vide Swain v. Bussell*, 10 Ind. 438. But upon these points we need make no decision, for the reason that the defendant below stood upon his supposed legal title, derived from *Douglass*. He did not ask or seek the aid of the Court, to give him any benefit under the agreement, as an *executory* one. He stood upon the agreement, as an *executed* one, vesting the title in *Douglass*.

The question recurs, Whether the agreement should be deemed *executed*, and as vesting the title in *Douglass*, or whether it should be deemed *executory* merely.

We may remark in passing, that, if the agreement be deemed *executed*, and as vesting title in *Douglass*, we can not see how it would, in the least, benefit the defendant, for the reason that it would convey but a life estate. The estate conveyed terminated with the life of *Douglass*. There are no words of inheritance in the agreement, as that the land was conveyed to *Douglass and his heirs*. Without such words, as the law stood at the date of the contract, a life estate only passed. *Clearwater v. Rose*, 1 Blackf. 137. 4 Kent. Com., p. 5. This rule does not apply to conveyances by joint-tenants, tenants in common, or co-parceners, to their co-tenants. *Id.*, p. 7. But the parties to the agreement did

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not claim, nor does the agreement purport that they held in common, or as joint-tenants, or co-parceners, but that they had "conflicting claims" upon the land. There is no *conflict* between the rights of joint-tenants, etc., but the rights of one are perfectly consistent with the rights of each of the others. It may be observed here, however, that if the agreement be deemed executory, it may be construed as an agreement to convey the fee. *Id.*

The agreement in question is neither sealed nor acknowledged. Nor, although an acknowledgment was not essential, yet, as the law then stood, a seal was essential to an instrument conveying real estate. Without an instrument under the seal of the grantor, the title could not pass. *Swiston v. The Junction Railroad Co.*, 7 Ind. 597. 4 Kent. 533.

We have some curative statutes, validating conveyances in certain cases, executed without a seal. *Vide Culbertson v. Parker*, 15 Ind. 234. We need not determine whether those statutes are applicable to the instrument in question, as we think the agreement should be held executory merely, on other grounds than simply the want of a seal. We think, however, that the want of a seal, when by law it was essential to the conveyance of real estate, and the want of an acknowledgment, when that was customarily appended, so as to entitle the instrument to record, are circumstances to be considered, in connection with the terms of the instrument, in determining whether the parties intended to pass the title *in presenti*, or whether they intended that the agreement should be executory merely.

The operative words of the agreement are "relinquish and abandon." These words are neither apt nor expressive to convey the idea of a grant, or the passing of title from one to another. Had the parties been joint-tenants, or tenants in common, the words would have been more appropriate; and perhaps, though we do not so decide, they would be sufficient in the present case, were there no other

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considerations that enter into the question. The instrument must be taken altogether, in order to determine its legal effect. The parties to the instrument, after stating that they had conflicting claims to the land, mutually relinquish and abandon to the other their claims to one-half thereof. They then stipulate, that, for the purpose of making a division, they enter into an arrangement by which each party is to have certain specific land. All this, however, as we construe the instrument, is upon the condition that the same shall be approved by the proper court, or courts, having jurisdiction thereof, when legal partition, or division thereof, shall be made. The approval stipulated for, it appears, has never been had. The relinquishment and abandonment depended as much upon the condition of approval as did the division agreed upon. The approval of the proper court was to be afterward procured. The parties contemplated, that the title to the portions taken by each should be made secure to them by the approval and confirmation of the proper court. Had the parties not agreed upon the portions to be taken by each, we can not say that they would have relinquished and abandoned their claims to any portion. We can not say, keeping in view the terms of the instrument, that the parties meant by it to divest themselves of title to one-half the land, immediately and absolutely, whether the division agreed upon should be "approved" or not. It is to be inferred, that the securing of the title, by the approval of the proper court, to the portion taken by each, was the inducement to the relinquishment of all claim to the other portion. The relinquishment and abandonment, then, as well as the division agreed upon, were to depend upon a future event, viz.: the approval provided for. This view of the instrument, coupled with the fact that it lacks an essential requisite, and one of the usual formalities of a conveyance, satisfy us that it should not be construed to vest title immediately in *Douglass*; but, on the contrary, that it should be

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deemed an executory agreement merely. It follows, that the judgment below is right, and must be affirmed.

Per Curiam.—The judgment is affirmed, with costs.

Edgar Haymond and Moses Jenkinson, for the appellant.

R. and J. Brackinridge, for the appellees.

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MITCHELL v. THE STATE.

An information for larceny, which avers, "that the defendant is now confined in the jail of *Floyd* county, charged with the felony herein set forth, and that he has not been indicted by any grand jury of said county," is sufficient to show jurisdiction in the Court of Common Pleas to try the cause.

The 11th section of the Common Pleas Act has not been so far repealed by implication, as that it may not be the subject of amendatory legislation. It has only been modified, not repealed.

APPEAL from the *Floyd* Common Pleas.

WORDEN, J.—Information against the accused for larceny. Plea of not guilty and judgment.

It is not disputed, that the information and affidavit properly charge the offense; hence, no question can properly arise here, except that which relates to the jurisdiction of the Court.

The information alleges, that "the said *John Mitchell* is now confined in the jail of *Floyd* county, charged with the felony herein set forth, and that he has not been indicted by any grand jury of the county of *Floyd*." This allegation brings the case, clearly enough, within the statute, which gives the Court of Common Pleas jurisdiction of felonies, "when a person is in custody, on a charge of felony, before indictment by the grand jury." Acts 1859, p. 94.

But it is insisted, that the act of 1859, conferring juris-

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dition, is void. The title of the act in question purports, that it is an act to amend section eleven of the act establishing Courts of Common Pleas, "so as to extend the jurisdiction of said Court, in certain cases." The ground taken is, that section eleven of the Common Pleas Act had already been repealed, and that as there was no such section to amend, the amendatory law was void.

Whether the conclusion would follow, from the premises, we need not determine, as the position, that section eleven was repealed, seems to be erroneously assumed. We are not aware of any statute that directly, or by implication, wholly repealed the section in question. That section conferred no jurisdiction in criminal cases, but only in civil. Civil jurisdiction was conferred where the sum due, etc., did *not exceed* one thousand dollars. A claim for just one thousand dollars was within the jurisdiction of that Court. But a subsequent act gave the Circuit Court exclusive jurisdiction in all cases of one thousand dollars or upward. It was held, that the latter act impliedly repealed the former, so far as it gave the Court of Common Pleas jurisdiction of one thousand dollars. *Fisher v. Prewitt*, 7 Ind. 519. *Murdock v. Wheelock*, 13 *Id.* 472. It has not been supposed, however, that the section was totally repealed by implication. On the contrary, the Common Pleas had complete jurisdiction in all cases provided for in that section, where the amount involved was less than one thousand dollars. The section in question having been in full force, except so far as its effect was modified, as above mentioned, legislation might well be had by way of amending it. It was amended so as to give the Court of Common Pleas jurisdiction in certain criminal cases, and in *Reed v. The State*, 12 Ind. 641, it was held that the title was sufficient for that purpose.

Per Curiam.—The judgment below is affirmed, with costs.
John H. Stotsenburg and *Thos. M. Brown*, for the appellant.
John Bott, for the appellee.

Campbell and Another *v.* The State.

HORNADAY and Others *v.* COOPER.

When time is given for the filing of a bill of exceptions, the record should affirmatively show that the bill was filed within the time limited, or it will not be considered as forming any part of the record before this Court.

APPEAL from the Scott Circuit Court.

Per Curiam.—The record in this case comes up in a state of considerable confusion, and we discover no question presented by it that can be legitimately made to appear without a bill of exceptions. Ninety days were given to file a bill of exceptions, and one was filed, but when does not appear. The time when the bill was filed should be shown, in order that it may affirmatively appear to have been done within the time limited. *Peck v. Vankirk*, 15 Ind. 159.

The judgment below is affirmed, with costs, and one per cent. damages.

C. L. Dunham and Wm. K. Marshall, for the appellants.

CAMPBELL and Another *v.* THE STATE.

APPEAL from the Vanderburg Common Pleas.

Per Curiam.—Information for larceny. Trial, conviction, and judgment.

The information alleges no facts giving the Court below jurisdiction of the offense.

The judgment is reversed, with costs.

The Clerk will give the proper notice for a return of the prisoners.

McDonald, Roache and Lewis, and A. J. Thornton, for the appellants.

Jones v. Dorr.

McCARTY v. THE STATE.

APPEAL from the *Decatur* Common Pleas.

Per Curiam.—Prosecution for grand larceny. Judgment for the State. No information is set forth in the record before us, nor does it appear that any such pleading was ever filed in the cause. We must, therefore, hold that the Common Pleas had no jurisdiction. *Claypool v. The State*, in this Court, May term, 1862. *Merry v. Purdy*, 19 Ala. 710. *Gonzales v. The State*, May term, 1862.

The judgment is reversed. The Clerk will give the proper notice for a return of the prisoner.

McDonald, Roache and Lewis, and *J. A. Thornton*, for the appellant.

JONES v. DORR.

Representations, by the payer of a note, that it is all right, and will be paid, made to a purchaser of such note, *after* he has become the owner thereof, shall not operate as an estoppel against the payer, nor can such representations, repeated by the purchaser thereof to any person to whom he may sell the same, have such effect in favor of such second purchaser.

APPEAL from the *Porter* Common Pleas.

DAVISON, J.—The appellee, who was the plaintiff, brought an action against *Balinda Jones*, to foreclose a mortgage on the west half of the north-west quarter of section 16, in township 35, north, of range 6, east, in *Porter* county. The mortgage bears date April the 15th, 1856, and was executed by the defendant to one *Thomas Englin*, to secure the payment of a note for two hundred dollars. It is averred, in the complaint, that *Englin*, by indorsement, assigned the note and mortgage to one *Absalom Leonard*, who indorsed

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them to the plaintiff. The defendant answered: 1. By a denial. 2. That the note, the payment of which is secured by the mortgage, was given for a part of the purchase money of the above-described real estate, which, at the time it was given, was sold, and, by deed in fee, conveyed by *Englin* to the defendant; and that *Englin*, the grantor, in and by said deed, covenanted that he was lawfully seized of the premises; that he had good right to convey; that they were unincumbered; and that he would warrant and defend the title to the same against all claims, etc. Of these covenants six breaches were alleged. The third and fourth were withdrawn before the cause was submitted for trial. The first, second, fifth, and sixth are as follows: 1. That the grantor was not lawfully seized, etc., and had not good right to sell and convey, etc. 2. That he had no title to the land. 5. That the same, at the time of the conveyance, was owned by the *Fort Wayne and Chicago Railroad Company*, and that company still owns it. 6. That when the conveyance was made, the land was incumbered by a deed, for the right of way over and across the same, executed to the *Fort Wayne and Chicago Railroad Company*, for the use of said company, and that after the defendant received said conveyance, the company entered upon and took possession of a part of the land, to-wit: four acres, worth one hundred and fifty dollars, and constructed thereon her railroad, and, in the construction thereof, has made large embankments and excavations of earth, to the damage of the land and of the defendant, two hundred dollars, etc.

The plaintiff's reply to the answer consists of a general denial, and four special paragraphs. The defendant demurred to the second, third, fourth, and fifth paragraphs. To the second the demurrer was overruled, but sustained as to the others. The issues were submitted to the Court, who found for the plaintiff, and having refused a new trial, rendered judgment, etc.

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The second reply, to which the demurrer was overruled, is as follows: "And the plaintiff says that, before he purchased the note from *Absalom Leonard*, as stated in the complaint, the defendant represented to *Leonard* that said note was all right, and just, and that she would pay it as soon as she could, and claimed no set-off or other defense to the same; that *Leonard*, when he sold the note to the plaintiff, informed him of the representations of the defendant respecting the note, and the plaintiff, believing said representations to be true, and relying upon them, purchased it of *Leonard*; wherefore, etc.

Was this reply sufficient to avoid the answer? If the representations and promises, set up in the reply, had been made to *Leonard*, when he was negotiating for the purchase of the note, and he had acted upon them, the defendant would have been estopped from setting up any defense to its validity, because, in that case, her admissions and representations would have constituted a valid estoppel. And the same would be true had they been made by *her* to the plaintiff, at the time he purchased. But these representations were made after *Leonard* had bought the note. He was not, in respect to his purchase, in any degree influenced by them, and the result is, they constituted no estoppel in his favor. If, then, the declarations were not an estoppel in *Leonard's* favor, no statement of his could make them an estoppel when pleaded by his assignee. The reason for this conclusion is obvious. The statements of *Leonard* are his own statements, not the statements of the defendant, and the plaintiff was not, therefore, authorized to rely upon them. The demurrer should have been sustained.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

Bradley and Woodward, for the appellants.

M. K. Farrand, for the appellee.

Louden and Others v. Dickerson and Others.

LOUDEN and Others v. DICKERSON and Others.

In an action to foreclose a mortgage, where some of the proceedings may be irregular, but the result of the action is such, that no party is injured, or has any cause to complain, this Court will not very closely examine the alleged irregularities.

APPEAL from the Marion Common Pleas.

HANNA, J.—A mortgage was executed by *Louden and Wife*, on certain lands, to *Nancy Dickerson*, to secure the payment of certain sums made payable to her, and, also, other sums payable to other persons; and respectively evidenced by notes of said *Louden* to each of said persons. Perhaps it may be inferred from the record, that said sums were the purchase money for the interest of said *Nancy*, as the widow, and the others, as heirs, of *William Dickerson*, deceased, in said land.

Said *Nancy* was the plaintiff; and *Louden and Wife*, and the persons, other than said *Nancy*, to whom notes were payable, were defendants. Upon the issues found, and trial had, there was a judgment, in a form, that will be noticed hereafter.

The first question is: Whether the suit was properly brought, as to parties? There is no allegation that the persons, other than said *Nancy*, to whom notes were payable, would not join, as plaintiffs, in said case. If such averment had been made, we suppose that, in view of our statute on that subject, no question would have been made as to the right of the plaintiff to sue; as it was, the mortgagor only made such question; his creditors, made defendants with him, did not.

Passing over that question for the present, we will look to the form of the judgment, which was, in the first place, in favor of the plaintiff, for the whole amount due on the notes secured by the mortgage, as well those payable to

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her, as those payable to others, who were defendants; it was then further ordered and adjudged, by the Court, that said plaintiff, and each of said defendants, of the said sum named in said judgment, in favor of said plaintiff, should severally recover a sum named, being the amount evidenced by the notes held by each.

It is not necessary, under this state of facts, to determine whether the complaint was good or not, in respect to the objection before indicated, because the form of the answer, by said persons, who might have been co-plaintiffs, and the judgment, show that there was no injury to them; nor, indeed, do they appeal; nor do we see any reason for complaint upon the part of the mortgagor, in that behalf.

Per Curiam.—The judgment is affirmed, with three per cent. damages and costs.

N. B. and C. Taylor, for the appellants.

BATES' Administrator v: SIMPSON and Others.

Where an allowance made by a Court of Common Pleas, against an estate, is the foundation of an action, a transcript thereof should be filed with the complaint.

APPEAL from the *Vanderburgh* Common Pleas.

HANNA, J.—The complaint avers, that before the filing thereof, “a complaint which had been, previously, etc., within the time prescribed by the statute, filed, in favor of said plaintiffs, against said estate, for the sum of two hundred and two dollars and two cents, was allowed by this Court, at its December term of said year.” Ability to pay and non-payment were averred. A demurrer to the complaint was overruled, judgment against defendant.

It is urged, that the complaint is defective, because no

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copy of the record of allowance, nor of the claim allowed, is filed, and we are cited to *Reasor v. Raney*, 14 Ind. 441.

The allowance made by the Court appears to have been the foundation of the action, and a transcript should, therefore, have been filed with the complaint, which was had in its absence.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

Asa Iglehart, for the appellants.

Charles E. Marsh, for the appellees.

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WILSON v. TRUELOCK.

Whatever of the proceedings of a Court should be brought before the Appellate Court, by bills of exceptions, can not be incorporated into the record of the cause, by the mere entries of the clerk; and if they are so incorporated, they will not be available as parts of the record, on appeal. It is the business of the clerks to enter the orders of the Court, and not to make a record of the reasons for such orders.

APPEAL from the *Scott* Circuit Court.

HANNA, J.—This was an action of replevin, commenced before a Justice of the Peace, and appealed to the Circuit Court. In the latter Court the cause was, on motion of the defendants, dismissed, “for want of jurisdiction in the Justice,” and the ruling excepted to, as shown by the clerk’s entry. There was no bill of exceptions; nor is the ground of objection to the ruling shown in any manner, other than as above set forth. It is assumed by the appellant, that the motion was based upon the fact that there was not a sufficient bond filed at the proper time, and that question alone is, by him, discussed. The appellee insists, that we are not

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properly informed, by the record, of the grounds upon which the motion was predicated.

It is the business of the clerk to enter the orders of the Court, and not to make a record of the reasons for such orders. *Hasselback v. Sinton*, 17 Ind. 545. The Court makes that record by bill of exceptions, etc. In the absence of such record, the presumption is in favor of the action of the Court.

Per Curiam.—The judgment is affirmed, with costs.

Randall Crawford, for the appellant.

Jewett and Crowe, for the appellees.

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Cox v. BLAIR and Another.

This Court will not notice a bill of exceptions which was filed two years after the expiration of the time limited for its filing, although filed with the consent of the Court below; if filed without the consent of the opposite party, and probably not, if filed with such consent.

APPEAL from the Clinton Common Pleas.

Per Curiam.—In this case sixty days were allowed a party to file a bill of exceptions. The bill of exceptions filed within the sixty days, if one was filed within that time, does not appear of record; but it appears of record, that over two years after the sixty days had elapsed, the Court allowed the party to withdraw a bill of exceptions said to be on file, and to file a new bill of exceptions, which is copied by the clerk in the record. We can not notice this bill. It was not filed with the consent of the opposite party, and we do not say that we should notice it if it had been.

The judgment is affirmed, with costs.

J. N. Sims, for the appellant.

Smith *v.* McMillen.

SMITH *v.* McMILLEN.

It is error for the Court, after a jury has heard the evidence, and been charged by the Court, and retired to consider of their verdict, to send its written instructions to the jury at their room, without consent of both parties.

The jury should receive their charge, and all subsequent instructions or explanations touching their duties, in open Court, in the presence of the parties.

APPEAL from the *Hamilton* Circuit Court.

PERKINS, J.—In this case the Circuit Court permitted the written instructions given upon the trial to be sent to the jury, in the absence and without the consent of one of the parties, and after the jury had been, for a long time, in deliberation upon the case.

The principle is, that the jury shall take the law from the Court. The mode in which the Court communicates with the jury is by addressing them in open Court. The jury take the law from the Court through the ear. By so doing, they generally stand upon equality, because none but men with hearing ears are competent jurors. In the jury-room, then, each depends upon his own recollection of the instructions, and upon the impression they made upon him for their meaning, their construction; and, thus standing upon an equality, if they differ, they should come into Court, and, in presence of the parties, let the Court be the interpreter of its own instructions. But if, instead of this being done, the Court sends the written instructions to the jury, inasmuch as jurors are not upon equality in their ability to read and interpret writing, it puts it in the power of sharp ones on the jury to read, and become the interpreters for the Court, and mislead their less skillful fellow-jurors. We think instructions should not be sent to the jury-room, without consent of both parties.

Adkins and Others *v.* Hudson and Others.

Per Curiam.—The judgment is reversed, with costs. Cause remanded for new trial.

Stone and Brouse, for the appellant.

HAWKINS and Others *v.* TEE GARDEN.

APPEAL from the *Fountain* Common Pleas.

Per Curiam.—In this case no question is presented to this Court. The case is brought up on the facts, but there is no bill of exceptions containing them.

The judgment below is affirmed, with costs.

Mallory and Birch, for the appellants.

ADKINS and Others *v.* HUDSON and Others.

An answer, setting up a former recovery, should contain a transcript of the record of the former cause.

The third sub-section of section 617, under the occupying claimant's law, does not limit the recovery to the value of the rents and profits which had accrued before the rendition of the judgment in the original or ejectment suit.

In actions under said law, where the Court finds that, without the improvements, no rents and profits would have accrued to the time of rendering judgment, it is error to charge the occupants with such rents and profits as have accrued by reason of his improvements alone.

APPEAL from the *Decatur* Circuit Court.

HANNA, J.—This was a suit to fix the value of the improvements on certain lands, alleged to have been formerly

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held by the appellants, under color of title, but of which they were found not to be the rightful owners. 2 Ind. 372.

Answer: 1. Denial. 2. That the same question was litigated in the former suit. 3. That the defendants had been, by the plaintiffs, kept out of possession, etc., from November, 1855, the date of the former recovery, until, etc.; and that waste, etc., had been committed, and rents, etc., received to the value, etc., which the defendants offered to offset, etc.

Demurrers were overruled to the second and third paragraphs of said answer.

This presents the first question.

It is impossible for us to say, whether the question of improvements was involved in the former suit or not, as the record thereof is not before us. The answer relying upon it is, therefore, bad for not setting it forth.

The statute is, that after filing the complaint as occupying claimant, "All issues joined thereon shall be tried as in other cases, and the Court or jury trying the cause shall assess, third, the fair value of the rents and profits which may have accrued, without the improvements, to the time of rendering judgment." 2 R. S. 172.

It is urged that this means the rendition of judgment in the original or ejectment suit. We think not. We can see no reason for it. That question had as well be settled in one suit as two. The third paragraph of the answer was, therefore, good.

Reply: 1. Denial. 2. Former recovery as to third paragraph of the answer. 3. Limitation as to some.

Trial by the Court; special finding of facts, as follows: "The Court finds that valuable improvements had been made on the premises in controversy, before the commencement of this suit to recover the possession of the same, to the amount of three hundred and twenty dollars; and that no damage or waste was sustained to the premises. And the Court further find, that no rents and profits would have

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accrued, without the improvements, to the time of rendering judgment. And the Court further finds, that the value of the land, without improvements, is eight hundred and eighty dollars, and with the improvements, twelve hundred dollars. The Court further find, the value of the rents from 1843, up to the year 1849, one hundred and forty-two dollars and sixty cents, and the rents due from said premises, from 1855 to 1861, to be two hundred and seventy-nine dollars, making in all, due for rents, four hundred and twenty-one dollars and fifty cents; deducting improvements, leaving a balance due said defendants, of one hundred and one dollars and fifty cents." For the last-named sum, judgment was rendered for the defendants.

Perhaps the plaintiff did not suffer any injury from the erroneous ruling on the second paragraph of the answer, as this finding shows that the Court estimated the value of the improvements. But the case must be reversed for another reason. The statute quoted, shows that, in assessing the value of the rents, it must be done "without the improvements." The Court finds, in this case, that there would have been no rents on the property without the improvements. It was error, therefore, to charge these plaintiffs with rents, which were but the results of their own labor, in improving the property, not the proceeds of the land as they received it. Perhaps the proper mode of taking advantage of this finding would have been, by asking a judgment for the value of the improvements, without regard to the assessment as to rents; but as this was not done, but a motion was made for a new trial, based upon the erroneous finding, as to rent, it reaches the same question.

The judgment in ejectment appears to have been rendered in November, 1855, and, perhaps, though there is nothing showing such to be the fact, include a judgment for the rents, in the form of damages, for the six years preceding that time. The Court, in this case, permitted the defendants

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to prove the value of the rents from 1843 to 1849. Should this have been done?

This question is not necessary to the decision of this case, as presented by the special finding, and, as it is not fully argued, we do not think it proper to pass upon it now.

Per Curiam.—The judgment is reversed, with costs. Cause remanded for new trial.

J. S. Scobey, Will. Pound, and Oscar B. Hord, for the appellants.

CLARK *v.* SNYDER.

APPEAL from the *Jasper* Common Pleas.

Per Curiam.—Judgment in favor of the appellee against the appellant, by confession. The record presents no question for our decision, no steps having been taken in the Court below to correct the supposed errors. This being the case, we have not examined the alleged errors.

The appeal is dismissed, with costs.

David McDonald, for the appellant.

Rand and Hall, for the appellee.

JACOBY *v.* BECKETT AND WIFE.

Where land is sold as containing a certain number of acres, and a survey is made of it at the time, in presence of the grantor and grantee, and the latter takes possession, and occupies it over fourteen years, and the facts show that neither party contemplated going further upon the land of the grantor, in the direction in

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which the residue of his land was situated, than the survey indicated, and there was no fraud, or misrepresentations, or written contract broken, and the residue of the grantor's land was admitted by both parties to have been of much greater value than the part sold, but the land sold proves to contain a few acres less than the parties, at the time, supposed it did contain:

Held, that the grantee can not compel the grantor to make up the deficiency by conveying other land, etc.

APPEAL from the *Clinton* Circuit Court.

PERKINS, J.—In June, 1845, *Daniel K. Jacoby* and *Robert Beckett* were residents of *Butler* county, *Ohio*. *Beckett* owed *Jacoby* one thousand or twelve hundred dollars. He owned a large tract of land in *Clinton* county, *Indiana*, and agreed to convey to *Jacoby* one hundred and twenty acres off the west side of the tract, in payment of the debt above mentioned. There were a cabin and a well in the central part of *Beckett's* tract of land, and he told *Jacoby* he thought the one hundred and twenty acres off the west side would take them in. *Jacoby* agreed to take the land for the debt. The parties came together to *Indiana*, procured a surveyor to stake off one hundred and twenty acres on the west side of *Beckett's* tract, which he proceeded to do; but found the parcel set off lacked a few rods of including the cabin and well. *Jacoby* declined taking the land unless he could get them. It was then agreed, that he should purchase seven acres and twenty hundredths more, in a strip along the east line of his one hundred and twenty acres, for eleven or twelve dollars an acre, or, as one witness says, for a horse, which strip would take in the cabin and well; and the surveyor staked them off, pursuant to the agreement.

The remainder of *Beckett's* tract of land, being the east portion, was cultivated or timbered, and more valuable than the portion sold, and *Beckett* would not sell any of it at the price taken for the western portion. *Beckett and Wife* executed a deed to *Jacoby*, in which the land sold is described

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as follows: "Commencing at the south-west corner of the north-west fractional quarter of section 6, township 21, north, of range 1, east; thence north one hundred and eighteen poles to a stake on the Michigan road; thence north one hundred and twenty-nine poles and fifteen links, variation sixty-five degrees east, to a stake on said road, east thirty poles to a corner, witnessed by a beach, twenty inches diameter, south, eighty-four degrees west, sixteen links, and a sugar-tree, north, fifteen degrees east, seventeen links; thence south one hundred and fifty-nine poles to a stake, witnessed by a beach tree, thirty inches diameter, north, sixty-five degrees east, forty-three links; thence west one hundred and forty-two poles and twenty-one links to the place of beginning; containing one hundred and twenty-seven acres and twenty-hundredths of land."

Jacoby took possession of the land, and fenced and occupied it, according to the survey, without complaining, for upward of fourteen years, when he instituted this suit, alleging a mistake in the survey, occasioning a deficiency of about seven acres in quantity of land conveyed to him, and asking that his east line be moved enough further east, upon the land still owned by *Beckett*, to cover the alleged deficiency. It appears that the question of the accuracy of the first survey had been upon his mind "for several years." The Court below decided that *Jacoby* was not entitled to any relief, and dismissed his suit.

It may be mentioned, that *Jacoby* and *Beckett* both accompanied the surveyor, as far as he went, around the tract of land, and that the survey seems, by their consent, to have been carelessly made, partly by actual measurement, and partly by estimate; and that it does not appear that there was any written contract prior to the deed.

We think the Court below decided correctly. The case made is that of an executed contract. The deed has been made, the consideration has been all paid, and possession

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taken. It is not governed by the rules that might apply were the suit for a specific performance of an unexecuted contract. A rescission is not asked, and would not be granted on the facts, if it were. The plaintiff asks for a new deed, covering a strip containing seven more acres upon his east line; but he can not have this, because, at the original sale, neither party contemplated going further east than to take in the well and cabin, and beyond that the land is too valuable to go at the price. The plaintiff has got all the land he desired, but he paid a horse, or seventy or eighty dollars more than he expected to, for it. Under some circumstances that sum might have been recovered back. But in this case there was no fraud, no misrepresentation, no previous written contract departed from; the party took such means as he desired to establish his lines and corners; he was acquainted with them all; he took his deed by metes and bounds; the mistake was a very slight one; he has acquiesced in it, after having it upon his mind till the statute of limitations would bar a recovery back of money paid, even had it not been paid under such circumstances as probably bound him in the outset. *Marvin v. Bennett*, 8 Paige, 312. Fry on Specf. Perfm., Am. ed., top p. 315. Adams' Eq. Sid., p. 168. 1 Story's Eq., sec. 144. Willard's Eq., p.

Per Curiam.—The judgment is affirmed, with costs.

J. N. Sims, for the appellant.

R. P. Davison, for the appellees.

Thompson *v.* Oskamp.

THOMPSON *v.* OSKAMP.

Action on a note given for a patent-right. Answer, that the payee of the note represented himself as the owner of the patent, etc., and that, in fact, he was not the owner, and had no title.

Held, that the answer was good.

An answer is not regarded as double, where one of two grounds of defense is not well pleaded.

APPEAL from the *Franklin* Common Pleas.

Per Curiam.—Suit upon one of two five-hundred-dollar notes, given for the right to use a patent-right in the State of Ohio.

The first paragraph of the answer admitted that the two notes were given for a conveyance of the right, etc., but alleged that the payee of the note falsely and fraudulently represented that he had the exclusive right to sell, etc., in said State, and that the machine patented would perform in a specific manner; whereas, in truth, the machine would not perform in such manner, and the right was worthless.

The second paragraph was like the first, except that it averred, that he represented himself as the owner, while the paragraph did not negative the fact of ownership.

The fourth paragraph alleged, that the payee represented himself as the owner, etc., and then averred, that he was not the owner, and that he had no title.

The Court sustained a demurrer to the fourth paragraph, which, we think, was error, that paragraph being, in our opinion, good.

But it is contended that the error can not reverse the case, because the question of title was put in issue by the first and second paragraphs, and, hence, was triable upon those. But we think the whole case, including the briefs of counsel, shows that, in the Court below, those two paragraphs were treated as putting in issue the value of the right, not

Farhni v. Ramsee.

the title to it, and that a new trial should be granted, for the error in holding bad the fourth paragraph. See *Cronk v. Col*, 10 Ind. 485. An answer is not regarded as double, where one of two grounds of defense is not well pleaded.

The judgment is reversed, with costs. Cause remanded for further proceedings.

T. W. and E. N. Wollen, for the appellant.

Oversstreet and Hunter, for the appellee.

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FARHNI v. RAMSEE.

This Court will not presume that a note was made beyond its jurisdiction.

But even where the note was made in a foreign country, our laws, when appealed to for its enforcement, *prima facie*, furnish the rule of decision, unless by affirmative pleading, another rule is shown to be applicable.

APPEAL from the *Fountain* Common Pleas.

HANNA, J.—Suit on a note which has, at the end of it, these words, “*Berne, June 18, 1856.*”

Complaint in the ordinary form. Demurred to, and the demurrer sustained.

We are not apprised of the ground upon which the Court placed its ruling. There is no brief for the appellee.

We will not presume that the note was executed beyond our jurisdiction. *Franklin v. Thurston*, 8 Blackf. 160. *Hutchins v. Hanna*, 8 Ind. 533. But even if the contract had been made in a foreign country, our own laws, when our Courts are appealed to, *prima facie*, furnish the rule of decision, unless, in some instances, where a different rule or law can be pleaded, the benefit of which is desired. *Shaw v. Wood*, 8 Ind. 518.

Buckingham and Another v. Gregg.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

Tyler and Ristine, for the appellant.

BUCKINGHOUSE and Another v. GREGG.

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This Court will take judicial notice of a county created by a public statute, but not of one created by county commissioners under the general law.

The time of the erection of a new county by the commissioners, where it becomes material on a question of jurisdiction, must be proved.

The Court will judicially notice the time of the sessions of Courts, held in such new county, pursuant to law.

A suit, commenced to foreclose a mortgage, in the proper county, would not be defeated by the division of the county afterward.

The division of a county would not be complete, until a Court was so far organized therein as to enable suits to be commenced in such new county.

Where a note, executed and payable in another State, bears a higher rate of interest than is allowed in this State, and suit is instituted upon it in this State, it is not necessary to plead the law of the foreign State.

In such case, the Court presumes the common law to be in force in such other State (of the *United States*), with one or two exceptions, and as that law prescribes no rate of interest, the contract will be presumed valid by the existing law, when, and where, it was made.

On a foreclosure, where there is no order or judgment over, for any deficiency that may remain, after the sale of the property mortgaged, there is no personal judgment.

APPEAL from the Jasper Circuit Court.

Per Curiam.—The Court takes judicial notice of a county created by a public statute. But the Court does not take

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judicial notice of the time of the division of counties, and the erection of new ones, by county commissioners, under the general law. The time of the erection of a new county, by such process, where it becomes material, touching a question of jurisdiction, must be proved.

The Supreme Court, in a case appealed, would, doubtless, take notice of the session of the Court, when held in such county, pursuant to law.

Where a suit was commenced for the foreclosure of a mortgage, in the proper county, such suit would not be defeated by the division of the county afterward; and the division of the county would not be complete, till a Court was so far organized in the new county, as to enable suits to be commenced in such county. See 2 Blackf. 391.

Where a note is made, and made payable in another State, and bears a higher rate of interest than is allowed, by law, in this, but suit is instituted upon it, for collection, in this State, it is not necessary to plead any law of such State, touching interest. The Court presumes the common law to be in force in such other State, of the *United States*, with, perhaps, an exception or two; that law established no rate of interest, and hence we presume the contract valid, according to existing law, when and where it was made.

When a mortgage is foreclosed for the last installment, a decree that the property be sold, as property is sold under execution, to make the money, is good; because the sheriff only sells so much as will make the money, where the property is divisible. Where there is no order or judgment for any deficiency that may remain unpaid, after the sale of the land mortgaged, there is no personal judgment.

The judgment below is affirmed, with costs, and one per cent. damages.

McDonald and Walker, and Milroy and Tatman, for the appellants.

Jarrett v. Andrews.

JARRETT v. ANDREWS.

Before a judgment can be rendered against a person, on the agreement of his attorney, where the person does not personally appear, and has not been personally summoned, the attorney must produce and prove written authority from his client to consent to such judgment.

APPEAL from the *Rush* Common Pleas.

WORDEN, J.—In this case there was a judgment for the plaintiff below, by agreement. It does not appear that the defendant had been summoned, nor that he entered an appearance, personally, but the agreement for the judgment was made by attorney. The record does not show, affirmatively, that the attorney, making the agreement, had any written authority from his client to do so. In such case, written authority is necessary to be produced and proven, to the satisfaction of the Court, before judgment can be rendered on the agreement of the attorney. 2 R. S., 1852, p. 202, sec. 773.

We need not determine, in this case, whether it is necessary that the record should show, affirmatively, that such written agreement was produced and proven, or whether it should be presumed, the contrary not appearing. There is nothing properly before us. No exception was taken, and no application made to the Court below to be relieved from the judgment.

Per Curiam.—The appeal is dismissed, with costs.

M. M. Ray and B. F. Davis, for the appellant.

Free and Another v. Haworth.

FREE and Another v. HAWORTH.

Proceedings on a motion for a continuance are no part of the record, unless made so by a bill of exceptions.

A voluntary appearance, in full, to a cause of action, waives all defects in process or publication.

A defense assuming to answer the whole, but only answering a part of a cause of action, is bad on demurrer.

The law, as to penalties and costs, in force at the time of rendering judgments, governs.

But, as to the obligation of the contract, the law of its date, if to be executed where it is made, generally controls.

APPEAL from the *Union* Circuit Court.

Per Curiam.—The proceedings upon a motion for a continuance are no part of the record, unless made so by bill of exceptions. 16 Ind. 476.

A voluntary appearance, in full, to a cause, waives defects in process and publication. 13 Ind. 490. 10 *Id.* 380.

A paragraph assuming to answer the whole, but only answering a part of a cause of action, is bad on demurrer. 16 Ind. 327.

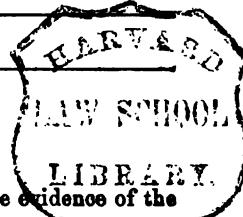
The law, as to penalties and costs, in force at the time of rendering judgment, governs; but as to the obligation of the contract, the law of its date, if to be executed where made, as a general proposition, controls. *Scoby v. Gibson*, 17 Ind.

The judgment below is affirmed, with one per cent. damages and costs.

J. F. Gardner, for the appellants.

John S. Reid, for the appellee.

Rogers v. Lewis.



ROGERS v. LEWIS.

In cases where there is a conflict of testimony, and the evidence of the winning party, taken by itself, will support the judgment rendered, it must be affirmed.

Testimony for the impeachment of a witness should go to his character at the time of the trial.

APPEAL from the *Owen* Circuit Court.

PERKINS, J.—*Lewis* sued *Rogers* upon a promissory note. *Rogers* gave the note to *Sylvanus H. Tarkington*, from whom it passed, by assignment, to the plaintiff.

The defendant, *Rogers*, answered, that he gave the note to *Tarkington* in consideration that *William D. Alexander* should make to him, *Rogers*, a deed for a lot in *Gosport*; that *Alexander* executed to him a bond for a deed, but had failed to execute or tender it; and that the lot had been sold, on execution, for *Alexander's* debt. The plaintiff replied by the general denial; and also specially averring, that the note was not given in consideration that *Alexander* should make a deed to *Rogers*; but, in consideration that *Tarkington* should relinquish to him, *Rogers*, the equitable interest he had in, and the right he had to require a deed from *Alexander* to, the lot in question; that he made the relinquishment; that *Rogers* procured a bond for a deed from *Alexander*, which he might have enforced, but neglected to do so; that he received possession of the lot, from which he had not been evicted, etc., and might still enforce his title from *Alexander*, and those claiming through him, by means of his bond, as the possession of the lot by him, *Rogers*, was notice, etc.

Trial by the Court. Judgment for the plaintiff. The cause is here upon the evidence. Three witnesses were examined. The testimony of two of them, if believed, taken by itself, proved the defendant's answer. The testimony of

Dougherty and Another *v.* Andrews.

one of them, *Tarkington* himself, if believed, taken by itself, proved the plaintiff's reply.

Here was a conflict of evidence; and the rule is, in such case, that, where the evidence of the winning party, taken by itself, will support the judgment rendered, it must be affirmed.

An attempt was made to impeach *Tarkington*, but no evidence, legitimate to the impeachment, was given. No witness examined knew his character, at the time of trial, or for three years previous. The testimony should go to the character at the time of the trial. 2 G. & H., p. 171, notes.

Per Curiam.—The judgment below is affirmed, with one per cent. damages and costs.

McDonald and Roache, for the appellant.

Newcomb and Tarkington, for the appellee.

DOUGHERTY and Another *v.* ANDREWS.

If the defendants have been notified legally of the pendency of the action, the written authority of their attorney need not be produced to enable him to act; but, if they have not been so notified, and judgment is rendered against them on the agreement of their attorney, they should apply to the Court below for relief from the judgment, and if denied them, on a proper case made, this Court may be asked to determine the rights of the parties.

APPEAL from the *Rush* Common Pleas.

Per Curiam.—Suit on notes. The record shows that the parties come by counsel, and a rule for answer is granted; and, that, on a subsequent day, they by counsel come, and it is agreed that judgment shall be rendered, etc. Judgment was rendered in accordance with the agreement.

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The record does not show that a summons was issued or served, nor a personal appearance of defendants; it is, therefore, insisted, that the judgment is a nullity; that under sec. 778, p. 202, 2 R. S., a written power or authority is requisite before the attorney could so act.

If the defendants had been notified, the written authority was not necessary to be produced to enable the attorney to act. If they had not been notified, etc., they should have applied to the Court below to be relieved from the judgment; if that Court had refused the proper relief upon a case made, then this Court could be appealed to.

The appeal dismissed, with costs.

M. M. Ray and B. F. Davis, for the appellants.

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EDWARDS v. JAGERS and Others.

In 1828 the legislature of *Indiana*, by law, constituted certain persons Seminary Trustees, for the county of *Switzerland*, for the special purposes in the act mentioned; among which were the selection of a site for a county seminary, the procurement of title thereto by donation or purchase, the solicitation of donations of lands, money, or property, to aid in the establishment of such a seminary, the preparation of a plan for the erection and management thereof, and to report their proceedings to the legislature.

In 1834 the legislature passed an act to incorporate the seminary, referring, in its preamble, to the former act, appointing trustees, and their report, and petition for a charter for said seminary, and the last-named act constitutes A, B, and others, and their successors in office, trustees of the *Switzerland County Seminary*, with power to sue and be sued, plead and be impleaded, answer and be answered unto, contract and be contracted with; to hold estates, real and personal, by gift, grant, contract, bequest, devise, or otherwise, and to all intents and purposes to be a body politic and

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cörperate, to have perpetual succession, to have a common seal, and the same to change at pleasure. It was, in said charter, made the duty of said trustees to erect and establish a seminary in said county, and conduct the same upon some approved plan, so as to secure to the greatest possible number of the children of said county, at the least possible expense, the advantages thereof. In April, 1834, C conveyed to said trustees, by way of donation, a site for said seminary, and said trustees erected and established the same thereon.

The Constitution of the State of *Indiana*, adopted in 1851, by sec. 2, of art. 8, provided for the sale of county seminaries, and the property held by them, for the purpose of organizing a general and uniform system of common schools, and the legislature, in 1852, in pursuance of said constitutional provision, enacted a law prescribing the manner in which said seminaries and property should be sold, and, in 1854, in the manner prescribed by said law, the *Switzerland County Seminary* was sold to D, who received a conveyance therefor, and instituted his suit for the possession thereof. Held, that, by reason of the provision in the tenth section of the first article of the Constitution of the *United States*, prohibiting any State from passing any law impairing the obligations of contracts, the provision in the Constitution of the State of *Indiana*, authorizing the sale of said seminaries, and the law enacted in pursuance thereof, as to said *Switzerland County Seminary*, are unconstitutional and void, and that said purchaser acquired no title by said sale.

APPEAL from the *Switzerland* Circuit Court.

WORDEN, J.—Action by *Edwards*, the appellant, against the appellees, to recover possession of certain real estate.

Trial by the Court; finding, and judgment for the defendants.

In January, 1828, (see Acts 1828, p. 124,) an act was passed by the legislature of the State, appointing *Israel R. Whitehead*, and others named in the act, as Seminary Trustees for the county of *Switzerland*, for the special purposes provided for therein. Among other things, the trustees were to

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select a site for a county seminary, and obtain, if possible, by donation, not less than an acre of land, to be used, occupied and employed by the inhabitants of said county for a county seminary; and, if no land can be procured by donation, then to procure the same by purchase; and, also, to ask for and receive all such donations of land, money, or property, as might be donated for the purpose of putting a county seminary in operation. The trustees were also to digest a plan of a building for a seminary, and the probable expense thereof, and such other matters connected therewith, respecting the raising of funds, and the pay of teachers, as their wisdom might suggest, and lay a full statement of the whole business before the legislature, with a petition for such a charter for a county seminary for said county, as they might deem proper. After the passage of this act, and before the act incorporating the seminary hereinafter mentioned, one *John David Dufour*, who was then the owner of the land in controversy, donated the same to the seminary, and executed a title bond therefor. Afterward, on the 1st of February, 1834, (see Acts 1834, p. 336,) an act was passed to incorporate the seminary. It recites, in the preamble, that "Whereas, the trustees of the *Switzerland County Seminary*, appointed by an act approved January 19th, 1828, have reported that, in pursuance of said act, they had located the site for said seminary, and have, in conformity to said act, prayed for a charter for said county seminary." It then enacts, that *James Rous*, and others, naming them, and their successors in office, are constituted and appointed trustees of the *Switzerland County Seminary*, with power to sue and be sued, plead and be impleaded, answer and be answered unto, contract and be contracted with; and hold estates, real and personal, by gift, grant, contract, bequest, devise, and otherwise, and, to all intents and purposes, to be a body politic and corporate; to have perpetual succession; to have a common seal, and the same to alter and change at pleasure.

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The corporation, thus created, is, by the express terms of the law, made to succeed to all the rights, etc., of the trustees appointed under the act first above mentioned. The trustees, thus appointed and incorporated, were to hold their offices until the first Monday of March, 1834, at which time, and annually thereafter, one trustee, in each township in the county, was to be elected by the voters thereof, which trustees, when so elected, were to hold their offices one year, and until their successors were elected and qualified.

It was made the duty of the trustees to cause to be erected, on the site thus located, suitable buildings for the seminary, and prepare the institution, by adopting the manual labor, or any other valuable system of education, so as to admit, free of charge, or with the least possible expense, to the full enjoyment of the privileges of the institution, the greatest possible number of the children of said county, both male and female. Each township in the county was entitled to have a number of children taught in the seminary, proportionate to the population. It was also provided, that when the time should arrive when there should be more scholars than could be taught in the seminary, the trustees should fix some equitable rule for ascertaining, by lot, what particular scholars of those that should apply, should be preferred, so that each township that could furnish its quota, should have an equal proportion of scholars. The trustees were also required, as soon as practicable, to prepare a female department, in which female scholars might be taught, upon such regulations as might insure valuable instruction to the greatest number, at the least expense. The trustees were to elect, from their own body, a president, secretary, and treasurer, and keep a record of their proceedings. They were empowered to make by-laws and regulations for the government of the seminary, employment of teachers, and the transaction of business. They were also authorized to receive from the treasurer of State the proportion of all moneys that might be due to

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the county seminary of *Switzerland* county. There was no reservation of a right to alter or amend the charter thus granted.

After the taking effect of this act, viz.: On the 18th of April, 1834, *Dufour* executed a conveyance of the premises to the trustees, for the use of the seminary.

Afterward, viz.: On the 3d of June, 1854, the auditor and treasurer of *Switzerland* county, in pursuance of an order of the board of commissioners of said county, previously made, due notice having been given, offered the premises at public sale, and *Edwards*, the plaintiff, became the purchaser, at the sum of one dollar and twenty-five cents, and received a conveyance.

The question arises, whether the sale and conveyance thus made, by the auditor and treasurer of *Switzerland* county, are valid, so as to vest the title in *Edwards*, or whether they are void?

The sale seems to have been made in accordance with the 8th article of the constitution of 1851, and a statute made in pursuance thereof. The constitution provides, that it shall be the duty of the general assembly "to provide, by law, for a general and uniform system of common schools, wherein tuition shall be without charge, and equally open to all." That the common school fund shall consist, among other things, of "the fund to be derived from the sale of county seminaries, and the money and property heretofore held for such seminaries; from the fines assessed for breaches of the penal laws of the State; and from all forfeitures which may accrue." An act was passed in 1852, (1 R. S., 1852, p. 437,) to carry out this provision, authorizing the county auditor and treasurer, in each of the counties of the State, to sell the seminary buildings and other property, real and personal, belonging to the seminaries of their respective counties, and providing that the proceeds, after making certain deductions, should be placed to the credit

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of the common school fund, to be disposed of in such manner as might be directed by law.

In the case of *The State v. Springfield Township*, 6 Ind. 83, it was held, that as section sixteen in each township was granted to the inhabitants of such township, for the use of schools, the school law, so far as it diverted the proceeds of said section from the proper township, and applied them to the use of the school system of the State at large, was a violation of the 7th section of the 8th article of the constitution of the State, which provides that, "All trust funds held by the State shall remain inviolate, and be faithfully and exclusively applied to the purposes for which the trust was created." That case is not decisive of the present, though much of the reasoning is applicable here. The "trust funds" mentioned in section 7 of the 8th article were evidently not intended to include county seminaries, or money and property held for such seminaries; otherwise, the framers of the constitution could not, very consistently, have provided for a sale of the seminaries, and diverting the property thereof to a general and uniform system of common schools.

The Federal Constitution provides, that no State shall pass any law impairing the obligation of contracts, and the question is presented, whether the provision in our State constitution and the law made in pursuance thereof, authorizing the county officers to sell the seminary buildings and property, and apply the proceeds to the common school fund, are not, as far as the seminary in question is concerned, in violation of the Federal Constitution.

It may be stated, generally, that certain principles have been established by the Federal Supreme Court, in respect to the construction and effect of the prohibition upon the States, by which the State Courts are bound. That Court having paramount jurisdiction upon questions arising under the Constitution of the *United States*, we have only to ascer-

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tain what has been determined, applicable to the case before us, and apply the doctrine accordingly. It has been determined, that an executed grant is as fully within the constitutional prohibition as an executory agreement. Hence, a conveyance which takes effect to transfer title, by delivery of the instrument, can not be revoked or impaired by State legislation. *Fletcher v. Peck*, 6 Cranch, 87, 136-139. The provision is not limited to dealings between individuals, but extends, equally, to contracts between State sovereignties and private parties; nor, in respect to contracts to which a State is a party, is it confined to such as relate to definite pecuniary obligations, or to specific real or personal property. It embraces charters and grants of corporate powers and privileges, when conferred for private and pecuniary objects. *Dartmouth College v. Woodward*, 4 Wheat. 518. *Green v. Biddle*, 8 Id. 2. *Gorden v. The Appeal Tax Court*, 3 How. 133. *State Bank of Ohio v. Knoop*, 16 Id. 369. *Dodge v. Woolsey*, 18 Id. 381.

But the charter of the seminary in question, and the rights and duties arising within it, require some further examination. We think from the provisions of the charter, the institution may be properly denominated a *private eleemosynary* corporation. Angel and Ames on Corp., sec. 39. It is evidently not one of those public corporations, such as are instituted merely for political and municipal purposes, over which the legislature have entire control. In the case of *Dartmouth College v. Woodward*, *supra*, the Supreme Court say: "Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes, and counties; and in many respects they are so, although they involve some private interest; but, strictly speaking, public corporations are such only as are founded by the government for public purposes, *where the whole interests belong also to the government*. If, therefore, the foundation be private, though under the charter of the government,

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the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature or objects of the institution."

The Court still further say, "When the corporation is said, at the bar, to be public, it is not only meant that the whole community may be the proper objects of its bounty, but that the government have the sole right, as trustees of the public interests, to regulate, control, and direct the corporation, and its funds and franchises, at its own good will and pleasure. Now, such an authority does not exist in the government, except where the corporation is, in the strictest sense, public; that is, where its whole interests and franchises are the exclusive property and domain of the government itself. If it had been otherwise, Courts of law would have been spared many laborious adjudications in respect to eleemosynary corporations, and the visitorial powers over them, from the time of *Lord Holt* down to the present day."

The object contemplated by the charter in question was the education of the children in the county of *Switzerland*, and not the children of the State at large; the funds to support this object were to be derived from gifts, devises, etc., in pursuance of the terms of the charter, in connection with the funds to be received from the State as provided for. The State, by bestowing upon the corporation the seminary fund mentioned, must be considered, like other donors, as having made an endowment. But that gives her no more right to control the institution, than a donation by a third person would give him such right. By the terms of the charter, she relinquished all right, as a sovereign State, to control the institution, as she reserved to herself no such right. The corporation is, nevertheless, subject to the general law of the land. The trustees, in case of an abuse of the trust, fraud, or other grievance, may be reached through the medium of a Court of Equity. *Dartmouth College v. Woodward, supra.* It is no answer to this view to say, that by

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the constitution of 1816, the moneys paid as an equivalent by persons exempt for military duty, and fines assessed for breaches of the criminal law, were to be applied to the support of county seminaries, and that, as the creation of this corporation was the means adopted to carry out the requirements in the county of *Switzerland*, the corporation should be regarded as a public State institution, subject to be controlled or destroyed by the legislature, and its property diverted to other purposes. Doubtless, the legislature might have created such a corporation as would have been, in the strictest sense, public, and subject to be controlled and destroyed by that body, and the property intrusted to it taken from it. But the question is, have they done so in this instance?

The case may be stated thus: the legislature created a corporation and authorized it to receive property to be used for, and applied to, a particular purpose. To that corporation *Dufour* made a donation of his land, to be applied, of course, to the purposes indicated by the charter. The State, by granting the charter, pledged its faith that it would not interfere with the trustees in the proper discharge of their duties as such; and there was an implied contract, between the donor and the corporation, that the property should be used only for the purposes indicated by the charter. An extract from the opinion of the Supreme Court, in the *Dartmouth College* case, will clearly elucidate this proposition. "By the terms of the charter," say the Court, "the trustees and their successors, in their corporate capacity, were to receive, hold, and exclusively manage, all the funds so contributed. The Crown, then, upon the face of the charter, pledged its faith that the donations of private benefactors should be perpetually devoted to their original purposes, without any interference on its own part, and should be forever administered by the trustees of the corporation, unless its franchises should be taken away by due process

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of law. From the very nature of the case, there was an implied contract, on the part of the Crown, with every benefactor, that if he would give his money, it should be deemed a charity protected by the charter, and be administered by the corporation according to the general law of the land. As soon, then, as a donation was made to the corporation, there was an implied contract springing up, and founded on a valuable consideration, that the Crown would not revoke or alter the charter, or change its administration without the consent of the corporation. There was, also, an implied contract, between the corporation itself and every benefactor, upon a like consideration, that it would administer his bounty according to the terms, and for the object stipulated in the charter."

In any view of the case that presents itself to our minds, we can not distinguish it, in principle, from that of the *Dartmouth College*, and we must hold, in accordance with the doctrines of that case, that the charter of the seminary, and the rights accruing under it, are protected by the Federal Constitution, and that the provision in the State Constitution authorizing a sale of property, and the law made in pursuance thereof, must be held void as respects this seminary; and hence, that *Edwards* acquired no title by his purchase.

We may remark, before leaving the subject, that we lay no stress upon the fact that *Dufour* donated the land, instead of having sold it for a valuable consideration. A *sale* to a seminary, like the one under consideration, might be made on terms much more favorable to the corporation than would be made in ordinary dealings in real estate, with a view to aid and assist the corporation in establishing an institution of learning, while the vendor might not feel able or willing to donate the property. And in case of a *sale*, there would be the same obligation, on the part of the State, to permit it to be used for the purposes designated by the

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charter; and the persons, for whose use it was purchased, would have a right equally as sacred as if it had been donated.

The language of the Supreme Court of the *United States*, in the case of *Terrett et al. v. Taylor et al.*, 9 Cranch, 43, is in point here. The Court say: "In respect to public corporations which exist only for public purposes, such as counties, towns, cities, etc., the legislature may, under proper limitations, have a right to change, modify, enlarge, or restrain them; securing, however, the property for the uses of those for whom, and at whose expense, it was originally purchased. But that the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the State, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit. And we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and letter of the Constitution of the *United States*, and upon the decisions of most respectable tribunals, in resisting such a doctrine."

Whether the right to receive the seminary funds, mentioned in the charter, may or may not be withdrawn from the corporation, is a question we have not considered, and do not decide. But we hold that, without the fault of the corporation, its franchises can not be destroyed, or its property seized and sold, or diverted to purposes other than those contemplated by the charter.

That the sale was authorized by the new constitution of the State can make no difference in principle. The language of the proposition is, that no State shall *pass any law* impairing the obligations of contracts. The substance of this provision is, that no State shall interfere, in any way, with

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the rights which citizens have acquired by contract. See the case of *Oliver Lee & Co.'s Bank*, 21 N. Y., p. 9; also, *Dodge v. Woolsey*, 18 How. 331. Indeed, a State constitution is but a higher grade of State law than that passed by the legislature, and can never be paramount to the Federal Constitution.

We have felt much reluctance in coming to the conclusion that a provision in our own constitution is void, as being in conflict with the Federal Constitution; but when we consider how much of the peace and happiness, liberty and prosperity of the people of this nation depends upon preserving the Federal Constitution intact, and free from the least infractions; and that it is the imperative duty of each State, as well as the Federal Government, to yield strict and implicit obedience to its behests, we can not but realize the fact, that we should be most recreant to the trust reposed in us, and to the duty which we owe to the country, and to ourselves, were we to suffer any considerations to swerve us from the discharge of our plain and unmistakable duty.

Per Curiam.—The judgment below is affirmed, with costs.

H. W. Harrington, for the appellant.

A. C. Downey, for the appellees.

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ADAMS and Others v. SATER and Others.

Where an action relates to the separate property of the wife, she may sue therefor, without joining her husband as a plaintiff in the action.

Where a person, pending an action against him for the collection of a debt, and on the day on which final judgment is rendered therein against him, but before the rendition of the judgment, conveys all his real estate, in four different parcels, to as many different

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grantees, for the consideration, expressed in each deed, of three hundred dollars, and his wife receives in return, a conveyance of a tract of land from one of them, and such judgment-creditor seeks to set aside said deeds as fraudulent, it would not be proper for the Court to instruct the jury, that, "the deeds, on their face, import a fair transaction." because such instruction might mislead the jury.

APPEAL from the *Bartholomew* Circuit Court.

PERKINS, J.—On the 4th day of February, 1858, *Nancy Sater* conveyed a tract of land to *Rebecca Sater*, the wife of *John Sater*.

On the same day, *John Sater* and *Rebecca*, his wife, acknowledged a deed, bearing date, April 9, 1857, to *William Sater*, for a tract of land.

On the same day, *John* and *Rebecca Sater* executed a deed to *Nancy Sater*, for a tract of land.

On the same day, *John* and *Rebecca Sater* acknowledged a deed, bearing date, April 9, 1857, to *Ephraim Sater*, for a tract of land.

On the same day, *John* and *Rebecca Sater* executed to *George W. Sater* a deed for a tract of land.

The consideration named in each of said deeds, from *Sater and Wife* to the several grantees, is three hundred dollars.

In October, 1858, *Carter, Adams, Taylor, and Fitch*, obtained judgments against *John Sater*, and, he having no property, in his own name, subject to execution, they caused executions to be levied on the property above described, as having been conveyed by and to the several persons named in the deeds, claiming that the same had been fraudulently conveyed.

Those persons, viz.: *Rebecca, William, Nancy, Ephraim, and George W. Sater*, filed a complaint for an injunction, restraining the sale of those tracts of land on said executions, and obtained a perpetual injunction.

It is claimed, that *John Sater* should have been made a

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party-plaintiff, with his wife, to the suit; but it would seem that it was not necessary that he should be. 2 G. & H., p. 41, notes. It does not appear, by the pleadings, that her husband had any interest in the tract of land so conveyed by *Nancy* to *Rebecca*.

It was held, in a late case in *Massachusetts*, (3 Allen, p. 541,) that a married woman, who held a bond, with condition to convey land to her, to her sole and separate use, free of the interference of her husband, upon the payment of a certain sum, is liable, in a separate action at law against her, under the statutes of that State, upon a promissory note given by her for money borrowed, to be applied, and actually applied, in payment of the amount necessary to secure to her the conveyance of the land; and, also, upon a promissory note given by her for money borrowed, for the purpose of paying debts contracted by her, for matters necessary for carrying on the farm, after she had received a deed for it.

As to the force and effect of the judgments, as evidence of indebtedness, in this case, where the plaintiffs were not parties to them, see *Belmont v. Coleman*, 21 N. Y. Court of Appeals, p. 96; and *Roswell v. Simonton*, 2 Ind., p. 516.

The Court instructed the jury, among other things, thus: "The deeds, on their face, import a fair transaction."

We think this instruction, under the circumstances of the case, may have misled the jury. We must look at the instruction as applicable to the case. It was not the case of a single deed in an ordinary case.

Here was a judgment obtained against *Sater*, the grantor in the deeds. Awhile before the judgment is rendered, and on the same day, he executes deeds, distributing all his property among certain persons, and his wife receives, in return, a conveyance for a tract of land, from one of them. The same consideration is named in the several deeds. Some of them bear a prior date. Now, the Court tells the jury that, as matter of law, these deeds, considered altogether,

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thus appearing in the case, as the jury may have understood the instruction, import a fair transaction. If this was so, then, if there had been no evidence in the cause but the deeds, the Court should have told the jury there was no evidence tending to show a fraudulent conveyance. But could the Court, legally, have thus told the jury in this case? Might not the jury have found the deeds fraudulent, taking them altogether, in connection with the judgment which was before them, in the pleadings, without any other evidence? We think it was a question for the jury, as the case stood, whether the deeds imported a fair transaction, on their face.

Per Curiam.—The judgment is reversed, with costs. Cause remanded for another trial.

S. Stansifer and C. E. Walker, for the appellants.

A. W. Hendricks and R. Hill, for the appellees.

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JOHNS v. THE STATE.

A person, who, out of the State of *Indiana*, becomes accessory before the fact to a felony committed within the State, can not be punished therefor under the laws of this State.

Section 2 (2 R. S., 1852, p. 361,) of our criminal code, must be construed to embrace only persons who, without the State, commit a crime, which, in legal contemplation, is to be deemed as having been committed within the State, under circumstances which will make the person thus committing it a principal in the crime.

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APPEAL from the *Delaware* Circuit Court.

WORDEN, J.—On the night of the 4th of February, 1862, the office of the treasurer of *Jay* county was broken open, and a large amount of money stolen therefrom. *Johns*, the

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appellant, together with three others, was indicted for the larceny. Upon trial, the appellant was convicted and sentenced to imprisonment in the penitentiary.

At the proper time, the appellant asked the following charge, which was applicable to the evidence, and was refused, viz.: "If the defendant did nothing more than, at a time previous to the commission of the crime charged in the indictment, to counsel with and encourage *Barker* and *Blackburn*, in the State of *Ohio*, to come to *Indiana*, and commit the larceny charged in the indictment, and was not, himself, in *Indiana* at the time the offense was committed, or nearer the place than the city of *Dayton*, State of *Ohio*, he should be acquitted on this indictment."

In determining whether the conviction can be sustained, two questions arise. *First*: Whether an accessory before the fact can be convicted on the indictment for the larceny, to which he was thus accessory? and *Second*: Whether he can be convicted where the acts done by him, making him such accessory, were committed without the limits of the State? If either of these questions shall be determined against the State, the judgment must be reversed.

From the view which we take of the second question, it will be unnecessary to pass upon the first, but a few observations may be made upon it, having some bearing, incidently, upon the second. At common law, an accessory before the fact must have been charged *as such*, and not as principal; and he could not be convicted, except jointly with, or after the principal, whose acquittal acquitted him. 1 Bishop Crim. Law, secs. 467, 468. But our statutes have, for many purposes, abrogated all distinction between principal and accessory. Thus, the 49th section of the act concerning crime and punishment, (2 R. S., 1852, p. 422,) subjects persons aiding or abetting, etc., in the commission of crime (felonies), to the same punishment prescribed for principals; and the 51st section enacts, that they may be indicted and

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convicted, before or after the principal offender is indicted and convicted.

The 66th section of the act regulating practice in criminal cases provides that, "Any person who counsels, aids or abets in the commission of any offense may be charged, tried, and convicted, in the same manner as if he were a principal." The terms of this section are clear and explicit, and, if valid, would seem to authorize the conviction of an accessory before the fact on an indictment charging him with the principal offense.

But in the Bill of Rights, (Constitution, art. 1, sec. 13,) it is declared that, "In all criminal prosecutions, the accused shall have the right * * * to demand the *nature and cause* of the accusation against him, and to have a copy thereof." Whether, where the State seeks a conviction on the ground that the accused is an accessory before the fact, an indictment which charges him as principal, sufficiently apprises him of the "nature and cause of the accusation," is a question which we leave open, it being unnecessary to determine it. Where it shall become necessary to determine it, the Court will, undoubtedly, have the benefit of a full discussion of the question, by counsel, on both sides.

We pass to the second question: Can a person who, out of the State, becomes an accessory before the fact, to a felony committed within the State, be punished by our laws?

The State relies upon the following provision of our statute, viz.: "Every person, being without this State, committing or consummating an offense by an agent, or means within the State, is liable to be punished by the laws thereof, in the same manner as if he were present, and had commenced and consummated the offense within the State." 2 R. S., 1852, p. 361, sec. 2.

Before undertaking to give this provision an interpretation, we will advert to some general principles that will aid us in doing so. It may be assumed, as a general proposition,

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that the criminal laws of a State do not bind, and can not affect, those out of the territorial limits of the State.

Each State, in respect to each of the others, is an independent sovereignty, possessing ample powers, and the exclusive right, to determine, within its own borders, what shall be tolerated, and what prohibited; what shall be deemed innocent, and what criminal; its powers being limited only by the Federal Constitution, and the nature and objects of government. While each State is thus sovereign within its own limits, it can not impose its laws upon those outside of the limits of its sovereign power. Our own constitution has expressly fixed the boundaries of its sovereignty. It provides, after having defined the geographical boundaries of the State, that "The State of *Indiana* shall possess jurisdiction and sovereignty coextensive with the boundaries declared in the preceding section; and shall have concurrent jurisdiction, in civil and criminal cases, with the State of *Kentucky* on the *Ohio* river, and the State of *Illinois* on the *Wabash*, so far as said rivers form the common boundary between this State and the said States respectively." Constitution, art. 14, sec. 2.

But, while it is clear that the criminal law of a State can have no extra-territorial operation, it is equally clear that each State may protect her own citizens in the enjoyment of life, liberty, and property, by determining what acts, within her own limits, shall be deemed criminal, and by punishing the commission of those acts. And the right of punishment extends not only to persons who commit infractions of the criminal law *actually* within the State, but also to all persons who commit such infractions as are, in *contemplation of law*, within the State.

Decided cases will illustrate the last proposition. The case of *The People v. Adams*, 3 Denio, 190, was one in which this subject underwent a full discussion and examination. It was there held, that a person who, in the State of *Ohio*,

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made certain false representations, by means of which he obtained, *through innocent agents*, goods in the city of *New York*, was guilty of a violation of the laws of the latter State, and could be there punished. The case goes upon the ground that, as the agents through whom the goods were obtained were innocent, the party thus making the representations, and through such agents obtaining the goods, must be regarded as the principal in the crime, and, therefore, that personal presence in *New York* was not necessary. The Court say, "Personal presence, at the place where a crime is perpetrated, is not indispensable to make one a principal offender in its commission. Thus, where a gun is fired from the land, which kills a man at sea, the offense must be tried by the admiralty, and not by the common law courts; for the crime is committed where the death occurs, and not at the place whence the cause of death proceeds. And, on the same principle, an offense committed by firing a shot from one county, which takes effect in another, must be tried in the latter, for there the crime was committed. (1 Chit. Crim. Law, 155, 191. *United States v. Davis*, 2 Sum. 485.) In such cases the offender is the immediate actor in the perpetration of the crime, although not personally present at the place where the law adjudges it to be committed. He is there, however, by the instrument used to effect his purpose, and which the law holds sufficient to make him responsible, at that place, for the act done there.

"But crimes may be perpetrated through the instrumentality of living agents, in the absence of the principal, and our law-books are full of such cases. Where poison is knowingly sent, to be administered as medicine by attendants who are ignorant that it is poison, and death ensues, the person who thus procures the poison to be taken is guilty of murder. So, where a child without discretion, an idiot, or a madman, is induced by a third person to do a

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felonious act, the instigator alone is guilty, and although not personally present at the perpetration of the crime, he is a principal felon. * * * But where the agent is a guilty actor in the commission of the felony, the law makes him the principal offender, and the one by whom he was employed, or instigated, is, if absent, but an accessory before the fact." The case of *The King v. Brisne and Scott*, (4 East, 164,) cited in *The People v. Adams*, is also in point. It was an information for a conspiracy to cheat the Crown by false vouchers. The trial was in the county of *Middlesex*, and it appeared that all the acts in which either of the defendants *immediately* took part were done by them either on the high seas, at *Brassa Sound*, or at *Leswick*, in the isle of *Shetland*. The only acts proved to be done in *Middlesex* were those which were done by them *mediately*, through the intervention of *innocent* persons. Upon this it was objected, that all the acts of the defendants themselves, which constituted the offense of conspiracy, were committed out of the jurisdiction of the common law. But it was held, that the acts done by the innocent agents of the defendants, in *Middlesex*, were their acts done in that county. The case of *The Commonwealth v. Harvey*, reported in 8 Am. Jurist, 69, is also in point. There, *Harvey*, in the State of *New York*, had perpetrated a forgery, by means of which he procured, *through innocent persons*, a sum of money from a house in *Boston*, he remaining all the time in the State of *New York*. It was held, on the principle already adverted to, that he was amenable to the criminal law of *Massachusetts*, the crime, in contemplation of law, having been committed there.

There are other cases running through the books that serve to illustrate and establish our proposition, that a State may rightfully punish all persons who *commit* an offense within the State, either actually, or in contemplation of law; but it is unnecessary to extend this opinion by any further examination of them. Two circumstances may be noticed

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in reference to all the cases that have come under our observation: 1. The crime has been deemed, in law, to have been committed in the State where it was punished, although the perpetrator, at the time of its commission, may have been personally out of the State; and 2. The party punished has been held to be the person who *committed* it; that is, he has been held to be the principal, and not merely an accessory before the fact. Indeed, in no justly legal sense can it be said, that a man who, in one State, procures a responsible party to go out of that State into another, and there commit a crime, *commits* any crime *within the latter State*.

No case has come under our notice, and we presume there is none, where a party has been punished in a State where a crime has been committed, who was merely an accessory before the fact to such crime, in another State. On the contrary, the only direct adjudication that we are aware of, on the point, is the other way. The case alluded to is that of *Ex parte Joseph Smith*, (the Mormon prophet,) 3 McLean, 121. *Smith* had been charged, in Missouri, with being an accessory before the fact to an assault and battery, with intent to kill. The assault, etc., was perpetrated in *Missouri*, but *Smith's* acts, making him such accessory, were committed in the State of *Illinois*. Upon a requisition of the Governor of *Missouri* upon the Governor of *Illinois*, *Smith* was arrested, and took out a writ of *habeas corpus* for his discharge, and was brought before the Circuit Court of the *United States*. That Court express their views upon the point in question as follows: "It is the duty of the State of *Illinois* to make it criminal in one of its citizens to aid, abet, counsel, or advise, any person to commit a crime in her sister State. Any one violating the law would be amenable to the laws of *Illinois*, executed by its own tribunals. Those of *Missouri* could have no agency in his conviction and punishment. But if he shall go into *Missouri*, he owes obedience to her laws, and is liable before her courts,

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to be tried and punished for any crime he may commit there; and a plea that he was a citizen of another State would not avail him. If he escape, he may be surrendered to *Missouri* for trial. But when the offense is perpetrated in *Illinois*, the only right of *Missouri* is, to insist that *Illinois* compel her citizens to forbear to annoy her. This she has a right to expect. For the neglect of it, nations go to war, and violate territory." *Smith* was discharged from the arrest.

[With the light of these considerations before us, we return to the statutory provision before quoted, to ascertain its meaning. "Every person being without this State, committing, or consummating an offense by an agent, or means within the State, is liable," etc. This language, in our opinion, embraces all persons who may, without the State, commit a crime, which, in legal contemplation, is to be deemed as having been committed within the State, under circumstances that will make the person thus committing it a principal in the crime.] Such, for instance, as shooting from without the State, thereby killing a person within the same; sending an "infernal machine," through innocent agents, from without the State, whereby life is destroyed; and cases of a like character with these, and those mentioned in a former part of this opinion. Also, when a person, though out of the State, is *present*, aiding and abetting, so as to make himself a principal in the second degree, as may well be, a State line simply being between such person and the principal in the first degree, who in person perpetrates the offense. This construction seems to be in harmony with principle, and also with the authorities.

[But the provision can not be construed to embrace persons who, out of the State, become mere accessories before the fact to a crime committed within the State.] This conclusion is arrived at from the considerations already mentioned, and from the fact that the language does not admit of such

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interpretation. Penal statutes, says *Bishop*, "are to reach no further in meaning than their words; no person is to be made subject to them by implication; and all doubts concerning their interpretation are to preponderate in favor of the accused." 1 *Bishop's Crim. Law*, sec. 115.

What do the words "every person committing or consummating" mean? Undoubtedly, every person who commits or consummates an offense as provided for. This embraces those only who commit or consummate the offense, and not those who, being absent, have merely counseled, etc., the commission or consummation thereof. But it is said, that he who, out of the State, counsels, aids, etc., another to commit a crime within the State, commits the crime himself, by an agent. If a party, being absent, procures an *innocent* agent to commit a crime, he himself, as we have seen, becomes the principal; which was clearly not the case here. If, on the other hand, a party, being absent, procures a *guilty* agent to commit the crime, the agent thus committing it is the principal, and the party thus procuring it is an accessory before the fact, and can in no legal sense be said to have *committed* it.

It may be said, that a man who procures another to commit a crime is as guilty, morally, as he who actually commits it. This all may be, but it does not prove that the Courts of another State than that in which the offense was committed, have a right to punish it. We have a statute providing for the punishment of persons who have become accessories before the fact to felonies committed in other States. Stat., 1853, p. 72. It is not unfair to presume that Ohio has a similar one. But whether she has or not, the defendant can not be punished under our laws.

It is urged, that, inasmuch as by our law the distinction between principal and accessory is, in many respects, taken away, there should be no distinction made in the construction of the section under consideration. But it is laid down,

The State *v.* Curzy.

that a statute will not be taken, by implication, to abrogate the distinction between principal and accessory, or any other distinction already known to the law. 1 Bish. Crim. Law, sec. 86. *The State v. Ricker*, 29 Maine, 84.

For these reasons the judgment must be reversed.

Per Curiam.—The judgment is reversed, and the cause remanded. The clerk will give the proper notice for a return of the prisoner.

D. Kilgore, for the appellant.

Oscar B. Hord, Attorney-General, *Walter March*, *John F. Kibbey*, and *W. A. Peelle*, for the State.

THE STATE *v.* CURZY.

An information which charges that the defendant, within two years of the commencement of the prosecution, did, knowingly, encourage a negro, named A. B., who had come into the State about the 1st of December, 1860, to remain in the State, by giving him employment and furnishing him a home, is good, and not subject to be quashed.

APPEAL from the *Jefferson* Common Pleas.

Per Curiam.—The affidavit and information in this case were filed in 1861, and charge that the defendant, within two years of the commencement of the prosecution, did, knowingly, encourage a negro man named *Wilson*, who had come into the State about the 1st of December, 1860, which fact was known to the defendant, to remain in the State; such encouragement being given by giving him employment, and furnishing him a home, etc. The information was quashed. We think the information was good.

The judgment is reversed, with costs. Cause remanded, etc.

Oscar B. Hord, Attorney-General, for the State.

Noble's Executrix v. Noble.

NOBLE'S Executrix v. NOBLE.

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Since 1853, upon the death of a wife, testate or intestate, leaving a widower, he is entitled to one-third of her estate, both real and personal, subject to his proportion of the debts of the wife contracted before marriage.

APPEAL from the *Franklin* Common Pleas.

PERKINS, J.—*Emily H. Noble*, the wife of *James Noble*, departed this life, testate, leaving personal property, hers separately, of considerable value.

James Noble, her widower, applied to the Common Pleas Court of the proper county, for direction to the executrix of *Emily H. Noble*, deceased, to pay to him the value of one-third of the personal estate above mentioned, subject, etc., left by the said *Emily*. *James Noble* took nothing under the will. The direction was given, and, we think, rightly.

By the common law, and the law of *Indiana*, prior to 1853, the husband acquired all the personal property of the wife, by marriage. Her personal estate, and the use of her real estate, came, upon marriage, into the common stock for the benefit of the family.

But, since 1853, her real estate, the income from it, and her personal estate, existing at the marriage, and that acquired by descent, devise or gift, afterward, remain hers, and she is not obliged to appropriate any of it to the support of the family. But if she dies before her husband, then one-third of her estate, real and personal, goes to him, without regard to any will which the wife may have made. This is the express language of the statute. 1 G. & H., p. 295.

Per Curiam.—The judgment below is affirmed, with costs.

Holland and *Binkley*, for the appellant.

Johnson, for the appellee.

The State, on the Relation of Wilber *v.* Salyers and Others.

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THE STATE, on the Relation of WILBER *v.* SALYERS and Others.

Where a sheriff has several executions in his hands, at the same time, on different judgments, and levies any of them upon real estate, and sells it, he should apply the proceeds of the sale to the payment of the several judgments in the order of their seniority, paying the oldest judgment first, without any reference to the fact that the levies and sale may have been made on executions issued upon junior judgments.

The purchaser, at a sheriff's sale on execution, is not bound to see that the sheriff makes a proper return to the executions, or that he makes any return.

When a sheriff levies an execution upon real estate, and sells it for enough to pay the debt, receives the money, and makes the purchaser a deed, the judgment is extinguished, whether the sheriff make return to the execution or not, or although he make a false return.

In such case the judgment-plaintiff must look to the sheriff and his sureties, and can not again collect the debt of the judgment defendant.

Any sale afterward made to pay such judgment, if made to a person having actual or constructive notice of the facts, would be an absolute nullity, and the weight of authority would seem to render any sale upon such a satisfied judgment, whether made to an innocent purchaser or not, an absolute nullity.

APPEAL from the *Jefferson* Circuit Court.

WORDEN, J.—Action by the appellant against the appellees. Demurrer to the complaint sustained, and judgment for the defendants.

The suit is upon a sheriff's bond, conditioned in the usual form.

The complaint states, in substance, that the following judgments were recovered in said *Jefferson* Circuit Court:

1. On the 5th of February, 1856, by *The Madison In-*

The State, on the Relation of *Wilber v. Salyers and Others*.

surance Company against *Paul Hendricks* and others, for five hundred and twenty-one dollars and fifteen cents, and costs of suit.

2. On the 18th of March, 1856, by *Lawson & Yerkes* against *Paul and Josiah G. Hendricks*, for one hundred and twenty-five dollars and eight cents, and costs.

3. On the 18th of March, 1856, by *Henry F. West* against *Paul and Josiah G. Hendricks*, for one hundred and forty-seven dollars and forty-eight cents, and costs.

4. On the 20th of March, 1856, by *Charles E. Walker* against *Paul Hendricks*, for two hundred and seventy-one dollars and three cents, and costs.

5. On the 6th of May, 1856, by *Caleb Schmidlapp* against *Paul Hendricks*, for two hundred and twenty-seven dollars and forty-eight cents, and costs.

6. On the 5th of August, 1856, by *Abijah W. Pitcher* against *Paul Hendricks* and another, for one hundred and ninety-seven dollars and three cents, and costs.

7. On the 5th of August, 1856, by *Joseph P. Webster* against *Paul Hendricks*, for one hundred and forty-six dollars and seventeen cents, and costs.

8. On the 5th of August, 1856, by *Arthur Orr* against *Paul Hendricks*, for two hundred and twenty-seven dollars and twenty-four cents, and costs.

That on the 20th of December, 1856, executions on each of said judgments were in the hands of said *Salyers* as sheriff, to be by him served and collected. That the execution on the judgment in favor of the insurance company had been levied upon lot No. 4, etc., which, on the day last mentioned, the sheriff sold for the sum of one thousand and twenty-five dollars, which was paid down.

That the execution, in favor of *Schmidlapp*, was levied upon certain lots, describing them, in the addition west to the city of *Madison*. This property, at the same time, was bid off and purchased by the relator, *Wilber*, at the sum of one

The State, on the Relation of Wilber v. Salyers and Others.

hundred and forty dollars, which he paid down, and received the sheriff's deed.

That the execution, in favor of *Pitcher*, had been levied upon three lots, describing them, in the city of *Madison*, two of which lots were bid off and purchased by the relator, at the sum of one hundred and fifty dollars, and one by *William Stapp* at the sum of one hundred and twenty dollars, which moneys were paid down, and the parties received the sheriff's deed. That said sheriff received, in cash, on the three several sales thus made, on the 20th of December, 1856, the sum of one thousand four hundred and thirty-five dollars.

It is averred, that on said 20th of December, 1856, there was due, on the execution, in favor of the insurance company, including interest and costs, \$586 60	
On the execution, in favor of <i>Lawson & Yerkes</i> , including interest and costs, - - - - -	127 92
On the execution, in favor of <i>West</i> , including in- terest and costs, - - - - -	156 66
On the execution, in favor of <i>Walker</i> , including interest and costs, - - - - -	313 45
<hr/>	
Making - - - - -	\$1,184 63

These judgments were older than those under which *Wilber* made his said purchases.

It is averred, that it was the duty of the sheriff to pay said judgment with the money so made on said sales; but that he, knowingly, etc., left the judgments, in favor of *Lawson & Yerkes*, and in favor of *West*, wholly unpaid and unsatisfied, and falsely returned each of the executions thereon, "nothing found whereon to levy," which return was false and fraudulent.

That the sheriff disposed of the one thousand four hundred and thirty-five dollars as follows:

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1. He paid the judgment, in favor of the insurance company, in full, - - - - -	\$586 62
2. He paid the <i>Walker</i> judgment, - - - - -	318 45
	<hr/> \$900 07

Leaving undisposed of the sum of five hundred and thirty-four dollars and ninety-three cents, which he applied, in part, to younger judgments, and, in part, retains in his own hands.

That afterward, on the 24th of December, 1857, other writs of execution were issued upon said judgments in favor of *Lawson & Yerkes*, and of *West*, and were placed in the hands of said sheriff, to be levied upon the property so purchased by said *Wilber*; that these executions were levied upon said property, and afterward, on the 30th of January, 1858, the said property was sold by virtue thereof to other purchasers, whereby the relator lost the property thus purchased by him.

Such is the substance of the case made by the complaint.

The statement of a few legal propositions will be sufficient to dispose of the case. Each of the judgments became a lien upon the real estate of the defendants therein, from the date of the rendition thereof; and there is no doubt that the money made on the sales should have been applied on the several judgments, in the order of their seniority; paying the oldest judgment first, and so on until the moneys were exhausted. *Steele v. Hanna*, 8 Blackf. 326. *Harrison v. Stepp*, *Id.* 454. *McMahon v. Thompson*, 2 Ind. 114. *Peck v. Tiffany*, 2 Comst. 451. The executions were all in the hands of the sheriff at the time of the sale, and it was wholly immaterial upon whose execution the sales were made, the money should have been applied as above indicated. *Rogers v. Edmunds*, 6 N. H. 70.

Had the moneys been properly applied, the land purchased by the relator would have been discharged of the judgment

The State, on the Relation of Wilber *v.* Salyers and Others.

liens. But, in our opinion, the same result must follow, so far as he is concerned, as if the money had been properly applied. The purchaser of land at a sheriff's sale on execution, is not bound to see that the sheriff makes a proper return to the execution; nor, indeed, that he makes any return at all. *Doe v. Heath*, 7 Blackf. 154. See, also, *Neilson v. Neilson*, 5 Barb. 565.

There was more than enough made on the sale which took place on the 20th of December, 1856, to pay off all the judgments which were prior to those under which the relator purchased, including the *Lawson & Yerkes*, and the *West* judgments; and we have seen, that it was wholly immaterial under which one of the judgments the sales were made; the oldest judgment was entitled to be first paid, and so on in chronological order. The judgments in favor of *Lawson & Yerkes*, and of *West*, must be deemed to have been paid and satisfied by the sale thus made on the 20th of December, 1856, the money arising from that sale being applicable to their payment. It is clear enough, that when a sheriff levies an execution upon real estate, and sells it for enough to pay the debt, receives the money, and makes the purchaser a deed, the judgment is extinguished, whether the sheriff make return to the execution or not, or although he make a false return. *Neilson v. Neilson*, *supra*. In such case the judgment-plaintiff must look to the sheriff and his sureties, and can not again collect the debt of the judgment-defendant.

In this case *Lawson & Yerkes*, and *West*, might have looked to the sheriff for their money, as having been realized by the sale made on the 20th of December, 1856, but they could not legally have issued another execution upon their judgments, as they had become liquidated and defunct.

The sale afterward made, on the 30th of January, 1858, we regard as an absolute nullity, if made to a person having actual or constructive notice of the facts, because the

The State, on the Relation of *Wilber v. Salyers and Others.*

judgments on which the executions issued, had been paid and satisfied by virtue of the former sale. Indeed, the weight of authority seems to be, that a sale on a satisfied judgment will vest no title, even in an innocent purchaser. *Wood v. Colvin*, 2 Hill, 566. *Neilson v. Neilson, supra*. *Hammett v. Wyman*, 9 Mass. 138. *King v. Goodwin*, 16 *Id.* 63. *Jackson v. Cadwell*, 1 Cow. 622.

But suppose a sale to an innocent purchaser, under such circumstances, would be good, still there is not enough shown, by the complaint, to invalidate the title of *Wilber*, the relator, as it does not appear who was the purchaser at the latter sale, nor that he had not notice. For aught that appears, the sale may have been to the execution-plaintiffs, or to a purchaser having notice of the facts.

From all that is stated in the complaint, it does not appear that *Wilber's* title is at all affected by the sale made on the 30th of January, 1858; hence, he seems to have no valid cause of action against the sheriff. Whether or not, had his title been defeated by the latter sale, he could have sued the sheriff, on his bond, for making a false return to an execution in favor of another, or for not properly applying the proceeds of the first sale, or whether he should have taken steps to stop the second sale, we need not determine. The ground upon which we place the case is, that it does not appear that the relator has been injured by the wrongful acts of the sheriff. Hence, the judgment below must be affirmed.

Per Curiam.—The judgment is affirmed, with costs.

S. C. Stevens, for the appellant.

Quick v. Goodwin and Others.

QUICK v. GOODWIN and Others.

A testator directed, by his will, that his real estate should be sold by his executors, for the highest and best price for cash, or on such credit, and the amount secured in such manner, as is usual in like cases, and that the proceeds should be distributed among certain persons. He appointed two sons and a son-in-law, executors. On May 20, 1851, about two thousand eight hundred acres of said lands were sold at public auction, in parcels of upward of three hundred acres, and purchased chiefly by the adult heirs, at about ten dollars per acre, and said executors purchased over eleven hundred acres thereof. In May, 1854, the executors filed their complaint against the other heirs, showing the facts, and praying confirmation of their purchase, or that their land be re-offered for sale, and if it would not sell for any more than they were to give, and the value of their improvements on it, that then their purchase should stand and be confirmed. The Court, on a trial, found the value of their improvements and ordered a re-sale, but no bid was received therefor, and, in July, 1854, their original purchase was confirmed. On December 20, 1859, one of the heirs sued said executors for an alleged balance due on his distributive share, and averred that the executors had used his legacy, etc., and claiming interest, etc. Demurrer sustained to the complaint in January, 1860, and amendment filed, charging that said executors, and other sons and daughters of the testator, had fraudulently combined, etc., and were each to bid in certain parcels of said land, and not to bid against each other, and to prevent others from bidding by representing that they would get into litigation, etc.; and said executors, in execution of said fraudulent purpose, offered said lands in large parcels to suit each of said heirs, and required cash down at said sale, by reason whereof said lands were purchased for much less than their value, and that when said lands were re-offered in 1854, the same frauds were repeated, and certain persons were paid for not bidding, etc.; and the plaintiff further averred, that, in 1851, he was a minor, and became of age in 1854, and was never apprised of said frauds until the winter of 1859-60. Prayer, that the sale be set aside, etc.

Quick v. Goodwin and Others.

Held, that the proceedings had in 1854, for the confirmation of said sales, were, in substance, such an adjudication as falls within the provisions of the code for the review of judgments, 2 R. S. 165, and the remedy there provided should have been pursued.

Held, also, that section 219, 2 R. S. 77, does not apply to cases where frauds have been committed in obtaining judgments, but rather to the matter which is the foundation of the action to obtain the judgment, and not the proceedings or judgment based thereon.

Held, also, that fraud in obtaining a judgment may be shown as a cause for review, but it must be done within the time and in the manner prescribed in the statute.

APPEAL from the Warren Common Pleas.

HANNA, J.—Prior to 1851, *James Goodwin* died testate, leaving seven children, and one set of grand-children, as well as a widow. Several specific bequests were made, after which the will provides as follows:

“I also order and direct, that all the real and personal estate of which I shall die seized or possessed, (except the bequests heretofore named,) shall be sold by my executors, for the highest and best price for cash, or on such credit, and the amount secured in such manner, as is usual in like cases, to insure the full and punctual payment thereof, and I direct and ordain that the amount of money raised by the disposal of real and personal estate hereinbefore ordered by me to be sold or otherwise disposed of, to be divided in the following manner, to-wit: To *Thomas Goodwin*, *Harrison Goodwin*, *John W. Goodwin*, *Abner Goodwin*, the heirs of the body of *Elizabeth Quick*, deceased, *Indiana Clark* and *Martha Lyons*, each, one equal share and share alike, among the sons and daughters of my body, and the amount devised, or share bequeathed, to the heirs of the body of *Elizabeth Quick*, deceased, shall be paid by my executors to them as they become of age. The share bequeathed to *Martha Lyons*, and the heirs of her body, is, by my executors, to be laid out in

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lands for their use and benefit." *James and John W., sons, and Clark*, a son-in-law, were appointed executors.

Such proceedings were had by said executors, that, on the 20th day of May, 1851, said lands, to the amount of about twenty-eight hundred acres, were sold at public sale and bid in by the adult heirs of said decedent, for about ten dollars per acre, in parcels of near three hundred acres, and upward, to each one, except *John W.* That the executors purchased, altogether, about eleven hundred acres of said land, at said sale.

Afterward, at the May term, 1854, of said Court, said executors filed a complaint against the balance of said heirs, showing the above facts, and alleged that they had made improvements, etc., and praying the Court, as doubts had arisen, etc., to confirm their purchase, or, that said property might be again offered for sale, and if it would not bring any more than they were to pay for the same, and the value of the improvements, that it might be confirmed to them, etc. It appears that the Court found the value of the improvements, and ordered the property to be offered in the parcels in which it was then held by said executors, one of them holding seven hundred acres, etc. Afterward they reported that it had been offered and no bid received, and, thereupon, on the — day of July, 1854, said purchases were confirmed to said original purchasers.

On the 20th day of December, 1859, the appellant, *John W. Quick*, one of said grand-children, brought suit against said executors for an alleged balance due him of his distributive share, averring that they had used the said legacy, etc., and closing interest and profits, etc. A demurrer was sustained to the complaint, at the January term of said Court, for the year 1860, and, thereupon, an amendment was filed, which, among other things, charged fraud in the sale of said lands. The complaint was several times further amended, until it ultimately set forth the facts above set out, and charged that said

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executors, and the other sons and daughters of said deceased, had fraudulently combined, etc., among themselves, to each bid off certain parcels of said lands, and not bid against each other; and that they also confederated together to prevent other persons from bidding on said lands, by representing that they would get into litigation, etc., and by bribery, etc. That by said agreement, said executors offered said lands in large parcels, to suit each of said heirs, and required cash down at said sale; that, in consequence of these various acts, said lands, purchased by said persons, were so purchased for twenty-eight thousand dollars, when, in fact, they were worth fifty thousand, and would have brought that much if offered in small lots, and on reasonable time, and clear of the appliances used, etc.; that at the reoffer of said lands, purchased by the executors, in 1854, said frauds were again resorted to, and, in addition to said lands being offered in such large parcels, it was given out that purchasers would get into litigation, and B and M were paid one hundred dollars if they would not bid, when they had intended and otherwise would have run said lands up to fifteen dollars per acre, etc.; that said appellant was a minor at said sale in 1851, and arrived at full age during the pending of the application of said executors to procure the confirmation of the sales made to themselves; and that he has been but lately, during the winter of 1859-60, apprised of the fraud perpetrated against his rights; praying that the sale may be set aside, and the lands again sold by a disinterested commissioner, "or that, inasmuch as lands, since the time of said sale, have, from fortuitous causes, become depreciated in value, said executors may be decreed to pay the difference between the actual value of said lands, when so pretended to be sold, and the price," etc.

There was a demurrer overruled to this complaint, and by cross errors assigned, and brief filed, the appellees press this as the only point upon which they rely; urging that it

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is shown that the remedy of the appellant, if any he ever had, is barred by the statute of limitations.

Waiving any discussion of the manner in which it was thus attempted to raise the point, for it was afterward raised by answer, we will proceed to examine it.

By the appellant it is urged that this case falls under the fourth subdivision of sec. 210, p. 75, 2 R. S., to-wit: "The following actions shall be commenced within six years after the cause of action has accrued, and not afterward: * * * Fourth, for relief against frauds." And that, as this form of action was adopted immediately upon the discovery of the fraud, it is in time, within the meaning of sec. 219, *Id.*

To this it is answered, in argument: *first*, that the section first quoted has no application, because it has reference only to suits to obtain judgments, not to proceedings to be relieved from judgments after they have been obtained; that such proceedings are governed by other statutes, namely: those governing applications for new trials, and to review judgments, under neither of which was this suit in time; and that the application must be in conformity with some statute; to which proposition is quoted *Woolly v. Woolly*, 12 Ind. 663, and *McQuigg v. McQuigg*, 13 *Id.* 296. And, *second*, if they are wrong in this, that still the plaintiff does not make a case of concealment, entitling him to relief.

As to the first point made by appellees: There being sufficient facts alleged in the complaint, it is clear that the plaintiff, even under sec. 210, quoted, was entitled to proceed to obtain relief, having commenced within six years, unless the order of the Court, made in 1854, confirming said sales, should be considered as interposing a bar in the way, by which he was compelled to seek his remedy under some other law. We do not find from the record, that the property had been, in 1851, sold by order of the Court; nor was such sale then confirmed. In 1854, upon the application of the executors, heretofore noticed, the sales to persons, other

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than said executors, were confirmed; and, as to said executors, the re-offer, report, and confirmation, were made as before alluded to.

Were these orders of confirmation, under the circumstances, judgments, within the meaning of the statute on the subject of proceeding to review? 2 R. S. 165. And if yea, then does sec. 219, as to concealment, etc., have any application to a proceeding, under that statute, to review?

We are of the opinion, that the order and conclusion of the Court, arrived at upon the application in 1854, as then entered, were, in substance, such an adjudication as falls within the provision and definition of the statute, 2 R. S. 165; and, following the decisions above cited, from 12th and 13th, Ind. R., we are further of the opinion, that the remedy pointed out by the statute should be pursued in the form and manner therein indicated. This might have been done by application for a new trial, or for a review of, or appeal from, the said adjudication, within the time fixed by the legislature. As the complaint showed that this had not been done within the time, it was defective, unless sec. 219 saved it, under the allegations of concealment made therein. This section, we think, has application to proceedings in transactions other than judgments, and was not intended to apply in cases where frauds were perpetrated in obtaining judgment. In other words, the matter which is the foundation of the action to obtain the judgment, and not the proceedings, or judgment based thereon, are affected by this provision of the statute. We suppose, under an application to review, etc., fraud in obtaining a judgment may be shown, as a cause, etc., but three years appears to be fixed as the limit within which such proceeding shall be instituted, and the act in relation to reviews contains no clause similar to sec. 219.

The demurrer to the complaint should have been sustained; and, as the judgment was for the plaintiff upon the

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hearing, as to a part of said lands, we think it ought to be reversed.

Per Curiam.—The judgment is reversed, with costs, and the cause remanded for further proceedings.

Joseph H. Brown and James Park, for the appellant.
McDonald and Roache, for the appellees.

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THE NEW ALBANY AND SALEM RAILROAD COMPANY and Others
v. HUFF.

The Circuit Court of one county has no jurisdiction to adjudicate upon the title to land in another county, where no part of the land, the title of which is involved in the action, is situated in the county of the forum.

A creditor, in the absence of a statutory prohibition, may, at any time, before liens have attached on his property, make a general or partial assignment to a trustee for the benefit of his creditors, with preferences, or he may assign the whole for the benefit of a single creditor.

The mere reservation, in such an assignment, of the surplus, "if any there should be," to the debtor, will not vitiate the assignment.

The omission, in an assignment, to limit the time for the assignee to apply the proceeds of the assigned property, is not objectionable; because the law, in such cases, requires it to be done in a reasonable time.

APPEAL from the *Tippecanoe* Circuit Court.

DAVISON, J.—*Huff* was the plaintiff below, and the appellants were the defendants. The following is the case made by the record: On the 6th of November, 1857, *Huff*, the plaintiff, recovered a judgment in the *Tippecanoe* Circuit Court, then in session for *Tippecanoe* county, against the *New Albany and Salem Railroad Company*, for three thousand and eighty-three dollars, with costs, etc. At the time of this re-

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covery there existed in that Court, against said company, other judgments for large amounts, which were, and still are, liens on the real estate of the company situate in said county, and amount to a sum largely beyond the value of any and all property situate in that county belonging to the company, so that an execution issued on the plaintiff's judgment at any time since its rendition, and levied on any and all of the company's property in said county, would have been useless and unavailing. In July, 1858, *Huff* caused an execution to issue on his judgment to the sheriff of *Jasper* county, by virtue of which he levied on certain lands in that county belonging to the company. On the 2d of August, 1857, the company executed to *Jesse J. Brown* a deed of conveyance, whereby she conveyed to him, in trust, certain real and personal estate described in the deed, among which are the lands so levied on by the sheriff. This deed is set forth in the pleadings, and says, among other things, "That the company, for the purpose of borrowing money to make and operate her railroad, and of paying debts incurred for that object, have procured several persons to become parties to divers notes, bills, and other contracts, by being makers, acceptors, or indorsers thereof, for the sole accommodation of the company. And the company may hereafter, for the same purpose, procure the same or other persons to become parties, in like manner, to other notes, bills, and contracts, for her sole accommodation, and on some or all of which notes, bills, or other contracts, such parties now are, and may hereafter become, liable. And being desirous to secure and indemnify them against all loss by reason of the matters aforesaid, the company, in consideration of the premises, and of one dollar paid to her by the said *Brown*, "grants, bargains, and sells to him all her lands, tenements, and hereditaments, wherever situate, which are not necessary for operating her railroad; and all her locomotives, passenger and freight cars, and appurtenances, etc.; and all materials, machinery,

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and tools of whatsoever kind, the title to which has become vested in said company since December 22, 1855; and all the lands, tenements, and hereditaments of said company, the title to which has become vested in her since her first organization, which are not necessary for the use of operating her railroad; and all the cord-wood along the entire line of said road, which has been purchased, and accepted, and taken possession of by the company since December 21, 1856; to have and to hold in trust, to sell and dispose of the same, from time to time, without any benefit whatever of any stay or appraisement laws, etc.; to pay any or all of said notes, bills, and other contracts, and to repay to all or any of said persons all sums they may have been obliged to pay, and fully to indemnify them severally for all loss they or any of them may sustain by reason of being a party to any such note, bill, or other contract, as aforesaid. After all said notes, bills, and other contracts shall be fully paid, and said persons shall be fully indemnified on account thereof, and after paying all just expenses of the trust, all the balance of said granted property, and the proceeds of any of it, if there shall be any such balance, shall be delivered to said company, until such property shall be wanted for the purposes of the trust, the same shall remain in the possession of the company; but the president thereof may, at his discretion, deliver the possession thereof to said *Brown* at an earlier time. And said trust is intended for the benefit of *John Bushnell, James Montgomery, Jesse J. Brown, George Lyman, James Brooks, Douw D. Williamson, George T. Talman*, and all others who have or may become parties to any note, bill, or other contract, for the company's sole accommodation.

It is averred, in the complaint, that at the time of the execution of the deed, the suit for the recovery of the plaintiff's judgment was pending in the *Montgomery* Circuit Court, and that the same was executed with intent to delay and defraud creditors, etc. The prayer for relief is, that the deed,

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from the company to *Brown*, be held fraudulent, etc.; that all the property which it describes be deemed liable to said judgment; and that the property levied on be sold without appraisement, and the proceeds thereof be applied to the satisfaction of said judgment, etc. The defendants demurred to the complaint, but their demurrer was overruled, and thereupon they answered by a general traverse.

The issues were submitted to the Court, upon an agreement which reads thus: "Defendants admit all the allegations in the complaint, with this exception: they do not admit that the deed is fraudulent on its face, and void with reference to the other facts therein alleged; they do not admit that they intended to commit a fraud, by or in said deed; but whether it was a fraud is to be judged of by the Court, from the deed and the alleged and admitted facts stated in the complaint. And the plaintiff admits the truth of the recitals in the deed; but does not admit that such deed is not fraudulent on its face with reference to the facts so stated. If the Court shall find the trust-deed fraudulent and void on its face, with reference to said other admitted facts, then the judgment shall be for the plaintiff, if the law, upon finding such deed fraudulent and void, authorizes such judgment; but if the Court shall not find the deed fraudulent and void, then the judgment shall be for the defendants. The defendants also reserve the right to claim that said trust-deed is operative as a mortgage, and to have it so adjudged, if the case authorizes such adjudication."

Upon final hearing, the Court found for the plaintiff; and motions for a new trial, and in arrest, having been overruled, it was adjudged that the deed from the company to *Brown* is, as to the plaintiff, fraudulent and void; that the lands therein described are subject to his judgment; and that those levied on, situate in *Jasper* county, be sold by the sheriff without appraisement, etc.

In support of the motion in arrest it is argued, that the

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real estate taken in execution, the title to which is directly involved in this suit, being in *Jasper* county, the *Tippecanoe* Circuit Court had no jurisdiction. The code says: "Actions for the following causes must be commenced in the county in which the subject of the action, or some part thereof, is situated: 1. For the recovery of real property, or an estate, or interest therein; or for the determination, in any form, of any such right or interest. 2. For the partition of real estate. 3. For the foreclosure of a mortgage on real property." 2 R. S., p. 83. Does this enactment apply to the case at bar? It is true, as contended, the trust-deed covers lands in *Tippecanoe* county, belonging to the company; but the title to these lands was not at all in issue, because, as a reason for the levy in *Jasper* county, it is alleged in the complaint that the lands in *Tippecanoe* were so largely encumbered that an execution, issued on plaintiff's judgment, and levied upon them, would have been unavailing. Indeed, the object of the suit was to annul the trust-deed, as to the property levied on, and to render the levy of the plaintiff's execution, on that property, effective. As has been seen, the levy was made in *Jasper* county, and the question arises, had the Court, before which this cause was determined, power to decide upon the title, and direct the sale of lands in that county? This inquiry seems to be fully answered by the statutory enactment to which we have referred: "Actions for the determination, in any form, of any right or interest in real property, must be commenced in the county in which the subject of the action, or some part thereof, is situated." The title to the lands levied on, by the plaintiff's execution, no part of which are situate in *Tippecanoe* county, was, plainly, the subject of the present action; hence, the Circuit Court of that county had no power to adjudicate upon the case made by the record.

The deed in question is alleged to be void in law, because it is a general assignment, as to part of the company's

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creditors, reserving benefits to the grantor. This position does not seem to be correct. A creditor, in the absence of a statutory prohibition, may, at any time before liens have attached on his property, make a general or partial assignment to a trustee, for the benefit of his creditors, with preferences. Indeed, he may assign the whole of his property for the benefit of a single creditor, in exclusion of all others; or he may distribute, in unequal proportions, either among a part or the whole of them. This seems to be a settled rule of decision. *Grover v. Wakeman*, 11 Wend. 187. *Burril on Assignments*, 117, 118, 119, and cases there cited. Nor does the mere reservation of the surplus, if any there should be, to the debtor, vitiate the assignment; "as creditors, not parties, can pursue their remedies against the debtor, following the surplus either in his hands or those of the trustee." *McFarland v. Birdsill*, at the present term.

Again: it is insisted that the trust-deed is void *per se*, because it fixes no limit of time within which the trust shall be executed. This position is also untenable. "An omission to limit any time for the assignee to apply the proceeds of the assigned property, is not objectionable, because the law, in such cases, requires it to be done in a reasonable time." *Stevens v. Bell*, 6 Mass. 339. *Cunningham v. Freborn*, 11 Wend. 241. See, also, *Burril on Assignments*, 203. We perceive nothing on the face of the deed before us, when viewed in reference to the agreed admission of facts, that leads to the conclusion that it is fraudulent in law or fact. It is true, the suit for the recovery of the plaintiff's judgment was pending when the trust-deed was executed. But the existence of that circumstance is not an available objection to the deed, because we have decided, that "The fact of the pendency of a suit against a debtor, when he conveys his property, is, of itself, no proof of fraud; for he may assign his property after, as well as before, action brought." *Stewart v. English*, 6 Ind. 176.

The Board of Commissioners of Floyd County *v.* Day.

Per Curiam.—The judgment is reversed, with costs. Cause remanded for further proceedings.

H. W. Chase, J. A. Wilstach, S. C. Willson, and J. E. McDonald, for the appellants.

John Pettit, S. A. Huff, and R. Jones, for the appellees.

NOTE.—This cause was decided in May, 1860, and should have been reported in an earlier volume, but was doubtless omitted by mistake.

WELCH *v.* THE STATE.

APPEAL from the Marion Common Pleas.

Per Curiam.—This case falls within the decision in the case of *Justice v. The State*, 17 Ind., p. 56, and must, therefore, be reversed.

The judgment is reversed, with costs.

McDonald, Roache, and Lewis for the appellant.

THE BOARD OF COMMISSIONERS OF FLOYD COUNTY *v.* DAY.

It is not error to refuse a continuance asked for because the causes of action were not filed with the complaint, either by copies or the originals, where it appears that such causes of action were, a reasonable time before the trial, handed to the defendant's attorneys by the plaintiff's attorneys.

A county is a corporation, with power to contract debts.

Debts of a county, evidenced by ordinary county orders, payable to A, or bearer, do not stand on the footing of those contracted under a special grant of power.

A corporation is a person, and a county is a corporation, and it will

The Board of Commissioners of Floyd County *v.* Day.

be presumed that the county auditor, in drawing orders, did his duty, and that such orders were given upon a consideration, until the contrary appears, and such orders will constitute a *prima facie* cause of action.

APPEAL from the *Floyd* Common Pleas.

PERKINS, J.—*Cook Day* sued *The Board of Commissioners of Floyd county*, on divers county orders, drawn by the auditor of *Floyd* county, on the treasurer of the county, and in favor of the persons named in said orders, “or bearer.” The treasurer had indorsed upon the orders that they had been presented for payment, etc.

Copies of the orders did not accompany the complaint, but were handed to the defendant’s attorneys, and the Court allowed them to be filed by the plaintiff by way of amendment, without subjecting him to a continuance on account of it.

The orders were accurately described in the complaint, and were in the hands of the defendant’s attorneys, and we do not see how the failure to file them with the complaint prejudiced the defendant in this case; and the statute is, that, if the Court sustain a demurrer, the plaintiff may amend by the payment of the costs occasioned thereby. 2 G. & H., p. 81, sec. 58; and p. 198, sec. 323.

No question was raised as to parties.

The defendant answered the general denial, without oath.

Trial by the Court; judgment for the plaintiff.

The orders were given in evidence.

The county of *Floyd* is a corporation, with power to contract debts. The debts evidenced by orders, such as those sued on in this case, do not stand on the footing of those contracted under a special conditional grant of power. See *The People v. Smead*, 24 N. Y. Court of Appeals, 114.

The auditor of the county is authorized by law to audit claims against the county, and to draw his warrant or order upon the treasurer for their payment. Such order, when

The State, *ex rel.*, etc. v. Bailey and Others.

drawn, is, in legal effect, the promissory note of the county, and is presumed to be upon a consideration, for it is assignable. A corporation is a person. *The Indiana and Illinois Central Railway Company v. Davis*, at this term. 1 G. & H., p. 122. 2 *Id.* 335, 658.

The officer, in the discharge of his general powers, will be presumed to have done his duty, in drawing a warrant or order, till the contrary appears; and, hence, such order makes a *prima facie* cause of action. *Hamilton v. The Newcastle, etc.*, 9 Ind. 359.

Impeachment must come from the defendant. *Smead v. The Indianapolis, etc.*, 11 Ind. 104.

The insertion of the words "or bearer," in the orders, was useless and harmless.

Per Curiam.—The judgment is affirmed, with one per cent. damages and costs.

Thomas L. Smith and M. C. Kerr, for the appellant.

G. V. Howk and R. M. Weir, for the appellee.

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THE STATE, *ex rel.*, etc. v. BAILEY and Others.

Where the articles of association of a railroad company are defective, in not specifying with sufficient certainty the terminus of the road, but they are properly filed in the office of the secretary of State, such filing is notice to the State of such defect, and the State neglects, for eight years, to take advantage thereof, by *quo warranto*, or otherwise, the right thereafter to do so must be considered lost.

APPEAL from the *Randolph* Circuit Court.

Per Curiam.—This was an information in the nature of a *quo warranto* against Bailey and others, who were acting as, and claiming to be, a railroad corporation, organized under

The State, *ex rel.*, etc. v. Bailey and Others.

the general law of the State authorizing such corporations.

The articles of association, by which the corporation, if it be such, was organized, were filed in the proper office, on the 25th of February, 1853; and the present information was filed for its dissolution on the 20th of September, 1861, more than eight and a half years after the pretended organization of the corporation.

The information contains but a single paragraph, and claims that the corporation is illegal, because its southern terminus is not sufficiently defined.

The articles of association specify the terminus of the road thus: "Said railroad shall commence at *Fort Wayne*, in the county of *Allen*, and shall be constructed to the eastern line of the county of *Wayne*, pointing in the general direction of *Cincinnati*, passing through the counties of, etc., its length being about one hundred miles, and shall be called *The Fort Wayne and Cincinnati Railroad Company*."

A demurrer was overruled to the complaint, and final judgment was given for the defendants, the corporation.

A doubt was expressed in *Heaston v. The Fort Wayne and Cincinnati Railroad Company*, 16 Ind. 275, whether the southern terminus was not too vaguely expressed; and we now express a doubt whether, in view of the fact that the road, as appears, was designated to form a part of a line to *Cincinnati*, a point in another State; and the further fact, that our law allows consolidations by railroad corporations in this State with like corporations in adjoining States, the southern terminus is so vaguely expressed as to vitiate the corporation. If it had been that that terminus was to be the east line of *Wayne* county, at the point where it would meet a road in *Ohio*, extending from *Cincinnati*, with which it was to form a continuous line between *Fort Wayne* and *Cincinnati*, we think it would clearly have been sufficient. Inferentially, perhaps, it is thus stated now. See *Eakright*

The State, *ex rel.*, etc. *v.* Bailey and Others.

v. *The Logansport, etc., Co.*, 13 Ind. 404. But we shall not decide this point, as there is another in the case which is decisive of it.

As we have seen, it was between eight and nine years after the corporation was organized before this information was filed. The State was notified at the time, of the manner of the organization, by the filing, on the part of the corporation, of her articles in the office of the secretary of State. We must presume that, soon after her organization, the corporation caused the line of her road to be located, and the terminus to be definitely fixed; that since that time, she has been acting, contracting debts, receiving and making conveyances of property, and complicating her affairs with the rights and business of the citizens of the State, and others; and it would not be just to now permit the State, after so long acquiescence, to amend the corporation on account of the objection raised. This point is settled by authority. The cases are cited in the 7th ed. of Ang. and Am. on Corp., sec. 743, and notes.

In *England*, charters for railways are granted altogether, after full surveys and definite plans, etc., by engineers, and with reference to them, questions of location and terminus can scarcely arise afterward. See chap. 15 of the 1st ed. of Redfield on Railways, and notes.

Per Curiam.—The judgment is affirmed, with costs.

Jer. Smith and John Davis, for the appellant.

McDonald, Roache and Lewis, for the appellee.

Parlan *v.* The State, *ex rel.*, etc.

KLIEN *v.* THE STATE.

APPEAL from the *Cass* Circuit Court.

Per Curiam.—Indictment for retailing. Judgment for the State.

The record does not properly show the impanneling of a grand jury, and the return, by that body, of the indictment into Court; hence, the judgment must be reversed.

The judgment is reversed, and the cause remanded.

D. D. Pratt, D. D. Dykeman, and John Guthrie, for the appellant.

PARLAN *v.* THE STATE, *ex rel.*, etc.

Where a defendant, in a prosecution for bastardy, has a preliminary hearing before a justice on a certain day, which is also the first day of the term of the Circuit Court for the county, he should be recognized, if at all, to appear at the next, and not the then present, term of said Court.

It would, therefore, be irregular and improper to docket the prosecution, and assign it for a day of the then present term, and proceed to call the defendant, take defaults, forfeit recognizances, etc.

APPEAL from the *Tippecanoe* Circuit Court.

HANNA, J..—On the 14th of April, 1862, the defendant had a hearing before a justice on a charge of bastardy, and was recognized to appear, etc., at the next term of the Circuit Court.

Said 14th of April was the first day of the spring term of said Court.

The transcript appears to have been filed on that day, the case docketed, and a day, during that term, fixed for its trial.

Parlan *v.* The State, *ex rel.*, etc.

On the day fixed, the defendant did not appear for trial. He was defaulted, and a bench warrant issued, upon which he was brought into Court, and entered into a recognizance for his appearance from day to day. Afterward, upon the call of the case for trial, he failed to appear. Trial and judgment against him.

Afterward he appeared, and moved the Court to set aside said default, and relieve him from said judgment, which was overruled, and said ruling excepted to.

The question presented to us is, Whether the Court had any jurisdiction of the person of the defendant at said term?

We are of the opinion that the recognizance was returnable to the next term of said Court, and not to the then present term. The proceedings, in having said case docketed, the defendant called, a forfeiture entered, a warrant issued, etc., were, to say the least, irregular, and the proceedings invalid, unless the action of the defendant, in entering into a recognizance for his appearance from day to day, should, under the circumstances, be received as an appearance to the action. Such a proposition we do not think is sound. There does not appear to have been any voluntary appearance in Court, even for the purpose of making the recognizance, to be relieved from restraint, much less such an appearance to the action as would be requisite to give the Court jurisdiction.

Per Curiam.—The judgment is reversed, with costs.

Daniel Mace, for the appellant.

J. J. Jones and J. L. Miller, for the State.

Haber, Roler, Hecker, Machler, Ruller, and Huber *v.* The State.

HABER *v.* THE STATE.

ROLER *v.* THE STATE.

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HECKER *v.* THE STATE.

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HECKER *v.* THE STATE.

MACHLER *v.* THE STATE.

MACHLER *v.* THE STATE.

RULLER *v.* THE STATE.

RULLER *v.* THE STATE.

HUBER *v.* THE STATE.

HUBER *v.* THE STATE.

Per Curiam.—The above causes are all here on appeal from the *Tippecanoe* Circuit Court, and the judgments rendered by that Court, in the cases respectively, must be affirmed, for the reasons given in the case of *Thomasson v. The State*, 15 Ind. 449.

The judgments are affirmed accordingly.

Taylor and Ward, for the appellant, in each case.

John L. Miller, for the State, in each case.

West v. The Bullskin Prairie Ditching Company.

WEST v. THE BULLSKIN PRAIRIE DITCHING COMPANY.

A complaint by a ditching company, organized under the general law of the State, for the collection of assessments made by the corporation in the progress of the drainage of the land of the defendant and others, should contain a copy of, or the original, assessment; because the assessment is in the nature of a mortgage, and should be made the foundation of the suit to enforce the lien; and the complaint should also describe the ditch to be constructed, by giving its direction and termini; and, perhaps, the outlet for the water which may empty into it.

APPEAL from the *Blackford* Circuit Court.

PERKINS, J.—Suit to enforce the lien of an assessment by a ditching corporation, under sec. 16 of the act for the construction of drains and levees. The complaint did not show the termini of the ditch, the lands, other than those of the defendant, through which it extended; nor did it show that the corporation had specified the same in their articles, or otherwise, by any order upon the records of the corporation; nor did it contain a copy of the assessment, or the original. It did not appear that the defendant was a member of the corporation.

The complaint was demurred to, because it did not contain facts sufficient to constitute a cause of action. The demurrer was overruled. We think it should have been sustained. The complaint was bad.

The assessment is like the declaration of intention by a mechanic to create a lien; is in the nature of a mortgage, and must be made the foundation of the suit to enforce the lien. The complaint should, also, have described the ditch to be constructed. The seventeenth section of the act above referred to, authorizes any defendant, not a member of the association, to answer that the proposed drain is not of public utility, or of private benefit to him. But it will be

Corbin and Others *v.* Flack.

manifest to the comprehension of any one, by a moment's thought, that to enable the defendant to determine whether he should so answer, he should be informed of the termini and direction of the entire drain, perhaps the outlet for the water which may empty into it.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, with leave to amend, etc.

Walter March, for the appellant.

J. S. Buckles, for the appellee.

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CORBIN and Others *v.* FLACK.

Where the ground of a defense is alleged false representations, made to induce the defendant to execute a note, it is not competent for him to prove that the same representations were made to another, in order to show that they were made to him, because representations, which had no effect in procuring the execution of the note, would be inoperative.

APPEAL from the *Marshall* Circuit Court.

HANNA, J.—Suit on a promissory note. Answer by *Corbin* and *Howe*, two of said defendants, in substance: That they were sureties only; that their signatures were obtained by the fraud of the principals, in this, in their representations and assurances that ten other responsible persons should sign the same, as sureties, before it should be put in circulation; and that on this condition, said defendants signed said note; but that it was in fraud, etc., put in circulation by delivery to the said payee, who had notice of the condition upon which it was signed. Reply in denial. Trial; verdict, and judgment for the plaintiff. Motion for new trial overruled.

Corbin and Others v. Flack.

It is assigned for error, that the Court erred in its ruling on refusing evidence, in instructing the jury, and in refusing a new trial.

One *Thompson* testified that he had been applied to, by the principal defendant, in the presence of the agent of the plaintiff, to sign the note, and certain representations were made as to the number of signatures that were to be obtained. He did not sign. The evidence was excluded, except so far as it tended to show notice to the plaintiff, etc. This ruling is complained of. We think it was right, for the representations that were made to one person, who did not execute the note, were not sufficient to show that the same were used to those who did, even if proof of such representations having been made in repeated instances, to various persons, would have had that tendency, of which we need say nothing.

The instructions are complained of. They are in substance :

First. That a note, executed upon the condition named, would not be binding if the person to whom it was passed had notice.

Second. That without such notice it would be binding

Third. That if signed under such representations, and with such notice, still it would be binding, unless the signature was made and to become binding upon the condition named.

There is nothing said about fraud.

The second instruction is complained of. It is not necessary that we should pass upon it, for the reason that the jury found, in answer to special interrogatories, in substance, that the note was not signed by defendants upon conditions. While that finding stands, of course it was not material whether there was any notice or not to the plaintiff, for indeed there was nothing to notify him of. The mere representations made, if they had no effect in procuring the signature, would be inoperative.

Piercy *v.* Piercy.

Per Curiam.—The judgment is affirmed, with two per cent. damages, and costs.

Newcomb and Tarkington, for the appellants.

J. Bradley, for the appellees

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BENNETT and Others *v.* BLACK.

APPEAL from the *Wells* Circuit Court.

Per Curiam.—The judgment in this case is affirmed, for the reasons given in the case of *Snyder v. Studebaker*, at the present term.

Affirmed, with costs.

John R. Coffroth, for the appellant.

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PIERCY *v.* PIERCY.

APPEAL from the *Monroe* Circuit Court.

Per Curiam.—For the reasons given in a case at this term, between the same parties, this judgment can not be sustained.

The judgment is reversed, with costs. Cause remanded.

McDonald and Roache, and *S. H. Buskirk*, for the appellant.

David Sheeks, for the appellee.

Snyder v. Studebaker.

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SNYDER v. STUDEBAKER.

Estoppels arise upon matters of fact, and not upon matter of law. If there was no law which authorized a supposed corporation, or, if the statute authorizing it was unconstitutional and void, a contract with such corporation would not estop the party making it, to dispute the existence of the corporation.

But, if there was a law which authorized the corporation, then, whether the corporation had complied with it, so as to have become legally incorporated, is a question of *fact*, and a party contracting with such corporation is estopped to dispute the organization, or the legal existence, of the corporation.

The cases of *Harriman v. Southam*, 16 Ind. 190, and *The Evansville, etc. Railroad Company v. The City of Evansville*, 15 Ind. 395, so far as the rulings therein are inconsistent with the foregoing, are overruled.

APPEAL from the *Wells* Circuit Court.

WORDEN, J.—This was an action by *Snyder* against *Studebaker*, to recover possession of a certain tract of land. Judgment for the defendant.

The same question is presented by the pleadings and the evidence.

It appears that, in March, 1853, the plaintiff, who was then the owner of the land, conveyed the same to the *Fort Wayne and Southern Railroad Company*, by deed, duly executed and delivered.

This conveyance was made on account of a stock subscription.

Afterward, in November, 1855, the railroad company, for a valuable consideration, conveyed the premises to the defendant.

The Fort Wayne and Southern Railroad Company was chartered by an act of the legislature, passed in 1849; and it appears that the corporators named in the act in question met in the town of *Bluffton*, in said county of *Wells*, on the

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19th day of November, 1851, and then and there accepted the act of incorporation, and organized the company pursuant to the provisions of said act.

If the corporation was not created before the 1st of November, 1851, when the new constitution took effect, it could have no existence at all, as that instrument prohibits the creation of corporations, other than banking, by special act. *The State v. Dawson*, 16 Ind. 40. *Harriman v. Southam*, *Id.* 190.

The plaintiff claims, that inasmuch as there was no acceptance of the charter, or organization under it, until after the adoption of the constitution of 1851, there was no such corporation as *The Fort Wayne and Southern Railroad Company* at the time he executed the conveyance, and, hence, that no title passed from him. But is he in a condition to dispute the existence of the corporation at the time he made his conveyance to it?

It has been held, in numerous cases in this State, that a party who has contracted with a corporation, as such, is, as a general proposition, estopped by his contract to dispute the existence of the corporation at the time of the contract. The following cases may be cited, though there are, perhaps, others reported, and some not reported as yet. *Judah v. The American Live Stock Insurance Company*, 4 Ind. 333. *The Brookville and Greensburg Turnpike Company v. McCarty*, 8 *Id.* 392. *Ensey v. The Cleveland and St. Louis Railroad Company*, 10 *Id.* 178. *Fort Wayne and Bluffton Turnpike Company v. Deam*, *Id.* 563. *Jones v. The Cincinnati Type Foundery Company*, 14 *Id.* 89. *Hubbard v. Chappell*, *Id.* 601. *The Evansville, etc. Railroad Company v. The City of Evansville*, 15 *Id.* 395. *Meikel v. The German Savings Fund Society*, 16 *Id.* 181. *Heaston v. The Cincinnati and Fort Wayne Railroad Company*, *Id.* 275.

The doctrine is by no means confined to the State, but prevails elsewhere. *The Dutchess Cotton Manufactory v.*

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Davis, 14 Johns. 238. *All Saints Church v. Lovett*, 1 Hall, 191. *Palmer v. Lawrence*, 3 Sand. Sup. C. R. 161. *Eaton v. Aspinwall*, 6 Duer. 176. *Jones v. Bank of Tennessee*; 8 B. Mon. 122. *Worcester Medical Institution v. Harding*, 11 Cush. 285. *The Congregational Society v. Perry*, 6 N. H. 164. *People's Savings Bank, etc. v. Collins*, 27 Conn. 142. *West Winsted Savings Bank v. Ford*, *Id.* 282. *Angel and Ames on Corp.*, sec. 94.

The estoppel arises upon matter of *fact* only, and not upon matter of *law*. Hence, if there be no law which authorized the supposed corporation, or if the statute authorizing it be unconstitutional and void, the contract does not estop the party making it, to dispute the existence of the corporation. But if, on the other hand, there be a law which authorized the corporation, then, whether the corporators have complied with it, so as to become duly incorporated, is a question of *fact*, and the party making the contract is estopped to dispute the organization or the legal existence of the corporation. This proposition is substantially stated in the cases of *Jones v. The Cincinnati Type Foundery Company*; *Meikel v. The German Savings Fund Society*; and *Heaston v. The Cincinnati and Fort Wayne Railroad Company*, *supra*.

Let us apply the doctrine to the case before us. The corporators named in the act to establish the *Fort Wayne and Southern Railroad Company* had a right, at any time before the offer of the franchises was withdrawn, that is, before the constitution of 1851 was adopted, to accept the charter, and organize under it. If they did so accept the charter, and organize, the corporation was legitimately created, and the new constitution did not destroy it.

Whether they did so accept the charter, and organize, was a question of fact, and the plaintiff, by his conveyance, is estopped to deny such acceptance and organization.

That the corporators accepted the charter, and organized under it, within the time when it was competent to do so,

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was as fully admitted by the contract, as was any other step necessary to an organization.

The conclusion necessarily follows, that the plaintiff is estopped to dispute the existence of the corporation at the time of his conveyance to it.

This point was ruled the other way in the case of *Harri-man v. Southam*, 16 Ind. 190, but, upon more mature reflection, we are satisfied that the decision upon this point was wrong, and should be overruled.

We may remark, also, that the doctrine of estoppel was erroneously applied in the case of *The Evansville, etc. Railroad Co. v. The City of Evansville*, 15 Ind. 395. There the point made was, that the law, under which the corporation was organized, was unconstitutional and void. A party, we have seen, does not, by his contract, estop himself to deny that there is any law, or any valid law, by which the corporation was authorized.

Some further observation, in respect to the case before us, will not be out of place. The doctrine of estoppel, as applied to the case, does not rest upon a mere technical rule of law. It has its foundation in the clearest equity, and the principles of natural justice. The doctrine of estoppel, *in pais*, is of comparatively recent growth, but is firmly and clearly established. "The recent decisions of the courts, both in this country and in England, appear to have given a much broader sweep to the doctrine of estoppel *in pais*, than that which formerly existed, and to have established that, in all cases where an act is done, or a statement made, by a party, the truth or efficacy of which it would be a fraud, on his part, to controvert or impair, there the character of an estoppel will be given to what would otherwise be mere matter of evidence, and it will, therefore, become binding upon a jury, even in the presence of proof of a contrary nature." 2 Smith, Lead. Ca. p. 531, 1 Am. Ed. See, also, upon this subject, *Kinney v. Farnsworth*, 17 Conn. 855.

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Middleton Bank v. Jerome, 18 *Id.*, 443. *Laney v. Laney*, 4 Ind. 149. In *Doe ex dem. Richardson v. Baldwin*, 1 Zubriskie, 397, it was said, that "The doctrine of estoppel rests upon the principle, that when one has done an act, or made a statement, which it would be a fraud, on his part, to controvert or impair, and such act or statement has so influenced any one that it has been acted upon, the party making it will be cut off from the power of retraction. It must appear, 1. That he has done some act, or made some admission inconsistent with his claim; 2. That the other party has acted upon such conduct or admission; 3. That such party will be injured by allowing the conduct or admission to be withdrawn." Here the plaintiff, by his conveyance to the corporation, admitted that it had an existence, and could receive the title. Upon this act and admission of the plaintiff the defendant has acted, in purchasing the land of the company. If the plaintiff had not conveyed to the corporation, the defendant would not have purchased from it. The law will not now permit the plaintiff to withdraw the admission made by him in conveying to the corporation, and deprive the defendant of the land which he purchased on the faith of such admission.

In our opinion, the judgment below is right, and must be affirmed.

Per Curiam.—The judgment is affirmed, with costs.

John R. Coffroth, for the appellant.

Piercy v. Piercy.

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A testator disposed of his property as follows: "I will and bequeath to my wife, for her lifetime support, all my personal property of which I may die seized or possessed. And, also, I will and direct, that all my real estate, if any, remaining unsold at the period of my decease, be sold to the best advantage, as soon as convenient after my decease, and the money secured, and appropriated with all the above-mentioned personal property, and also subject to and for the proper support of my wife during her natural lifetime; and at her decease, the total amount of the above-mentioned personal property, and money and claims, I will and hereby bequeath to my nephew, *John Piercy*, except any sum thereof, less than four hundred dollars, which amount my wife may, as she choose, dispose of by bequest, and only received after her decease as such legacy by her." Over twenty months after the testator's death, the widow elected to reject the provisions of the will, and to take under the law, and then sued to set aside the will for uncertainty, etc.

Held, that in the absence of any statute, fixing the time within which she shall make her election, the widow may make the same at any time, and lapse of time will not affect her right to take under the law.

Held, also, that said will was not void for uncertainty, but discloses sufficiently the testator's intentions.

Held, also, that the widow, having rejected the will, was entitled to one-third of the testator's property, in addition to the sum allowed to any widow.

APPEAL from the *Monroe* Circuit Court.

HANNA, J.—On the 3d day of May, 1858, *Joseph Piercy* died the owner of real and personal property; and leaving the appellant, his widow, but no parents, nor brothers or sisters, living; and, also, a will, which, so far as need be noticed, reads as follows:

"I will and bequeath to my beloved wife, *Hannah*, for

Piercy v. Piercy.

her lifetime support, all my personal property of which I may die seized or possessed. And also I will and direct, that all my real estate, if any, remaining unsold at the period of my decease, be sold to the best advantage, as soon as convenient after my decease, and the money well secured, and appropriated with all of the above-mentioned personal property, and also subject to and for the proper support of my wife during her natural lifetime; and, at her decease, the total amount of the above-mentioned personal property, and money and claims, I will and hereby bequeath to my nephew, *John Piercy*, of *Putnam* county, and who is the son of my brother, *Jacob Piercy*, deceased, except any sum thereof, less than four hundred dollars, which amount my wife, *Hannah*, may, as she choose, dispose of by bequest, and only received after her decease as such legacy by her."

On the 17th day of January, 1860, said widow filed a renunciation of any interest under said will, and stating that she elected to take under the law; and soon afterward instituted this proceeding to set aside said will, for the causes following:

1. Uncertainty, etc.
2. For assuming to dispose of all of the property of which he was possessed.
3. Because, after her election, the will was so vague, etc., as to be incapable of execution.

We are not informed whether there were other persons who, in the event of the setting aside said will, would be, equally with said *John*, entitled to take as heirs.

There was a demurrer sustained to the complaint.

It is urged that she did not elect, within a reasonable time, as to whether she would take under the will or not; and that, therefore, she was bound by her acquiescence in the disposition thereby made. In other words, that she takes under the will, in the absence of a renunciation filed in a reasonable time, which is assumed to be one year.

Piercy v. Piercy.

Counsel concede that there is no statute fixing the time within which the election shall be made, nor the consequences of a failure to make an election. We are referred to *Smith v. Baldwin*, 2 Ind. 404, and *McCarty v. Roberts*, 8 *Id.* 150, as favoring this construction. The statute quoted in *Smith v. Baldwin* is similar to that contained in the revision of 1852; but the point involved in that case was, whether the bequest was in addition to the statutory or dower interest of the wife, or in lieu thereof. The fact is not noticed in that opinion, although it was doubtless made in view thereof, that there was then in force a statute, noticed in the case quoted from 8 Ind., fixing the time within which an election should be made, to-wit: in one year; and the consequences of a failure to so elect, namely: that the will should prevail. In the absence of a statute of the latter character, we are of the opinion that the only necessity of an avowed election is to secure the widow in the provisions of the will; that a failure to elect, or act under, or in view of the provisions of the will, would give the widow the portion provided for her by the law. In other words, the law makes certain provisions for her from her husband's estate. To divest her of that interest, and give her some other, requires her consent. As she did not intend to take the provision made by the will, lapse of time did not affect her right to take under the law.

The purpose or intent of the testator seems to be readily seen, *viz.*: to provide for his wife during her life, and to bestow the residue, after her death, upon his nephew. Her failure to take the disposition made by him, and determination to take the amount fixed by law as her portion, does not change nor make uncertain the testator's intended disposition of the residue; that is, that it should go to his nephew. *First*, his wife was to be provided for; *second*, after that, the balance should go to his nephew. She renounced the provision, and claimed under the law; we do

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not perceive but that the residue, whatever it is, may still be his. What that residue is, remains to be determined. We are of opinion that, taking our whole statute together, she was entitled, under the circumstances, to but one-third in addition to such specific sum as is allowed to every widow. That amount the husband could not dispose of by will, without her election-consent. The residue he could so dispose of, if he saw proper, without her consent; and in this case he did make such disposition of it. Whether, after her portion is set aside, the balance is sold, and the proceeds paid over to the legatee, or the property set apart to him, we suppose is not material. As her complaint was not in the form, or apparent purpose, designed to obtain partition, but rather to set aside the will, and assume control of the whole, as if no will had been made, we are of the opinion the demurrer was properly sustained.

Per Curiam.—The judgment is affirmed, with costs.

David Sheeks, for the appellant.

S. H. Buskirk, J. E. McDonald, and A. L. Roache, for the appellee.

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A volunteer in the army of the *United States*, as a private, who is under the age of eighteen years, can not be compelled to continue in the service by virtue of his enlistment.

Since February 13, 1862, no consent of any one can give power to enlist a minor under the age of eighteen years.

And such a minor, so enlisted, and restrained by officers against his will, could probably maintain an action for damages against such officers.

The provision in the act of Congress, that the oath of enlistment

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taken by a recruit shall be conclusive as to his age, can not operate to conclude the parent or guardian of such recruit, if a minor, under the age aforesaid, nor to authorize the officers to retain him without the consent of such parent or guardian.

Sembler, that it is not competent for the legislative power to declare what shall be conclusive evidence of a fact.

APPEAL from a decision upon a writ of *habeas corpus*.

PERKINS, J.—The question in this case is, whether a volunteer in the army of the *United States*, as a private, who is under eighteen years of age, can be held to the service by virtue of his enlistment; and the Court is unanimously of the opinion that he can not be so held.

If he is to be regarded as a militiaman, in the service by the call of the President, he can not be held, because he is not a person subject to the Executive call under the Constitution and the acts of Congress. The President has never been authorized to call any but militia; and militia has always been defined, both by Congress and the State, to be citizens between the ages of eighteen and forty-five. See the State Constitution, and Brightly's Digest, p. 619.

But volunteers are not, technically, militia, within the meaning of the Constitution and laws, but a branch of the "army of the *United States*." *Kerr v. Jones*, at this term.

The present volunteers in the army of the *United States*, considered in distinction to that portion of the army called regulars, (who are also obtained as volunteers,) were raised, mainly, under acts of Congress of 1861, which authorized the President "to accept the services of volunteers," but prescribed no limit as to the age of the volunteer. *Acts Special Session*, pp. 21 and 24.

Under these statutes, it is contended, with plausibility, that a person of any age may enlist, with the consent of the officer on the one part, and those who would, at common law, have power to consent on the other; and this might be correct, had not the government, which confers powers upon

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the recruiting officers, limited these powers, by instructions, forbidding them to receive any one under eighteen years of age. But however this may be, it is not material to decide the point here, as, before the enlistment now in question was made, Congress interfered to remove all uncertainty in the matter.

Volunteers under the statutes named, before they become soldiers, have to be mustered into the service of the *United States*; and, on the 13th day of February, 1862, Congress enacted a law "that hereafter, no person under the age of eighteen years shall be mustered into the *United States' service*." This provision, of course, applies to all enlistments of volunteers from the date of the act, as acts of Congress take effect from their passage. *Acts of 1862*, p. 339.

From the 13th day of February, 1862, then, no consent could give power to enlist a minor under the age of eighteen, or could validate such enlistment while the minor continued under eighteen. A minor so enlisted, and afterward held in restraint, by officers, against his will, would probably have a cause of action for damages against the officers so holding him.

But the section further provides that, "the oath of enlistment taken by the recruit shall be conclusive as to his age." As to what the oath of enlistment is, see *Brightly's Digest*, p. 74, sec. 188.

Now, it is difficult to see how the oath of a boy that he is eighteen years old can make him so, if, in fact, he has not been in existence eighteen years; and it has been held, and it would seem that the decision must be correct, that it is not competent for the legislative power to declare what shall be conclusive evidence of a fact. See the cases in *Blackwell on Tax Titles*, p. 100, *et seq.*

Such declaration would seem to be a judicial act in each given case. But however this may be, the legislative declaration in this case can not operate to include the parent or

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guardian of the minor, and authorize the officer to retain him against the consent of such parent or guardian; and the case at bar does not require us to go beyond this.

It is ordered that the boy in the case be discharged.

T. A. Hendricks and *Oscar B. Hord*, and *R. L. Walpole*, for the petitioner.

J. S. Scoby, for the officer.

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1. Where a complaint is filed in the usual form, on a note and account, and a copy of the note and a bill of particulars of the account are filed with the complaint, and also an affidavit, in attachment, entitled of the cause, and in the form prescribed by the statute, properly verified, is filed, and thereupon a writ of attachment is issued, it is error to quash the attachment for insufficiency of the affidavit.—*Sweeny et al. v. Cochran*, 206

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1. A prosecution for bastardy is a civil proceeding, and the defendant is a competent witness for himself, under the law of 1861, on the subject of witnesses.—*The State v. Evans*, 92
2. The State may appeal in prosecutions for bastardy without filing a bond.—*Risk v. The State ex rel. etc.*, 152

3. In such prosecutions it is error to permit the State to give in evidence the illegitimate infant, for the purpose of enabling the jury to determine its paternity, by comparison of it with its alleged father, *Ibid.*

4. A prosecuting witness in a prosecution for bastardy may, in open court, dismiss the proceeding, under the approval of the Court; but if she compromise out of court, such compromise must be specially pleaded, by the defendant, to be available.—*The State ex rel., etc. v. Reyneerson*, 211

5. Where a defendant, in a prosecution for bastardy, has a preliminary hearing before a justice on a certain day, which is also the first day of the term of the Circuit Court for the county, he should be recognized, if at all, to appear at the next, and not the then present, term of said court.—*Parlan v. The State, etc.*, 455

6. It would, therefore, be irregular and improper to docket the prosecution, and assign it for a day of the then present term, and proceed to call the defendant, take defaults, forfeit recognizances, etc. *Ibid.*

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2. The judge of the lower court can not, out of term, grant leave to perfect a bill of exceptions, or extend the time for perfecting it, at his own instance. *Ibid.*

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1. The clerk's certificate to the official character of a justice of the peace should show that he was, at the time when the proceedings were had, or judgment was rendered, a justice of the peace, duly commissioned and qualified to act as such.—*Dresser v. Wood*, 199

CITIES.

See PLEADING, 9.

1. In suits for injunctions upon the performance of contracts for the improvement of streets in cities, and in suits upon injunction bonds arising out of them, the regularity of all the proceedings, up to the making of the contract, is open to investigation; but the judicial determination of their regularity in one, might be conclusive upon the trial as to the other suit.—*Macey v. Titcombe*, 135
2. A city, organized under the general law for the organization of cities, can not be enjoined from changing the grade of a street, or making any alteration therein, which causes consequential damages only to the adjoining proprietor, his property not being appropriated, although such damages have not been assessed and tendered.—*The City of Lafayette v. Bush et al.*, 326
3. Such consequential damage is not within the act for the incorporation of cities, which provides for assessing damages in certain cases; nor is it within the constitutional provision that private property shall not be taken for public uses, without compensation first assessed and tendered. *Ibid.*
4. But where a city desires to appropriate the real property of a citizen to the purposes of a street, the city must first comply with the provisions of the law, as to the assessment and tendering of damages to the owner. *Ibid.*

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1. Whatever of the proceedings of a court should be brought before the Appellate Court, by bills of exceptions, can not be incorporated into the record of the cause, by the mere entries of the clerk; and if they are so incorporated, they will not be available as parts of the record, on appeal. It is the business of the clerks to enter the orders of the Court, and not to make a record of the reasons for such orders.—*Wilson v. Truelock*, 389

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See LUCRATIVE OFFICE, 1, 2.

1. The office of colonel of volunteers, as now existing, is a lucrative office.—*Kerr v. Jones*, 351
2. The office of colonel of volunteers in the military service of the United States, as now organized, is not an office in the militia. *Ibid.*

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1. A commissioner, acting under a reference to him of matters in issue in a pending suit, has no right to report the evidence given before him, though he may report the facts proved by it, if authorized to do so by the parties.—*McClure et al. v. McClure et al.*, 185
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See PROMISSORY NOTES, 7. PLEADING, 16.

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2. It is not error to refuse a continuance asked for because the causes of action were not filed with the complaint, either by copies or the originals, where it appears that such causes of action were, a reasonable time before the trial, handed to the defendant's attorneys by the plaintiff's attorneys.—*The Board, etc. of Floyd County v. Day*, 450

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See PROMISSORY NOTES, 7. RESCISSION OF CONTRACTS, 1. PLEADING, 10, 44. RAILROAD, 3. VENDORS AND PURCHASERS, 3, 4, 10.

1. A conveyance, executed by a person *non compos mentis*, and not under guardianship, is not absolutely void, but voidable only.—*Crouse v. Holman*, 30
2. No contract, valid as to one party, can be held utterly void as to the other. *Ibid.*
3. Section 11, 2 R. S., 1852, p. 233, which declares "every contract, sale, or conveyance of any person, *while a person of unsound mind*, shall be void," applies alone to "a person of unsound mind," found to be so in the mode prescribed by the statutes. *Ibid.*
4. A contract, which is the foundation of an action, will be deemed to be unwritten, unless it appear, directly or inferentially, from the complaint, to have been in writing.—*Lamb et al. v. Donovan*, 40
5. A contract made with one person for the benefit of, or to secure the payment of money to another, may be enforced by the latter. *Ibid.*
6. A party to a contract can not treat it as good in part and void in part, but he must affirm it, or avoid it, as a whole.—*McGuire v. Callahan*, 128
7. If a party desires to avoid a contract, either on the ground of fraud or drunkenness, he must first place his adversary in the identical situation in which he was before the contract was executed. *Ibid.*
8. Where a party contracts to sell and deliver to another a specified number of fattened hogs, "*to be of his best hogs*, weighing two hundred pounds and upward," the purchaser is not obliged to receive any but hogs fattened and prepared for the market by the seller himself.—*Daggy v. Cox*, 142
9. The facts, that the stipulated number of hogs, in part fattened and prepared for market by the seller, and in part by other persons, were weighed in the presence of the purchaser's agent, without objection, and the purchaser offered to take them, provided the seller would receive, in part payment, certain certificates of deposit, which he refused, and the purchaser then refused to take them, "as they did not fill the contract," do not amount to a waiver of the purchaser's right to insist upon the kind of hogs contracted to be delivered. *Ibid.*
10. A note, made payable at a place in another State, and bearing a higher rate of interest than is lawful in this State, but not a higher rate than is allowed by the law of the place where it is payable,

may be enforced in this State according to its tenor.—*Lines et al. v. Mack,* 223

11. A agreed to sell and deliver to B between ninety and one hundred well-fatted, corn-fed hogs, each weighing, at least, one hundred and eighty pounds net, to be delivered at L, between the 1st and 15th of December, 1857, at the option of B, and the latter agreed to pay for them at the rate of six dollars per one hundred pounds net, on delivery, and to notify A of the particular time of delivery, between the days aforesaid; and if the cholera should break out among his hogs, A should only be required to deliver such of his hogs as remained sound, and should not be required to make up the number, and B shall advance one hundred dollars on the contract, which was done. B notified A to deliver the hogs on the 2d of December, 1857. They were not then delivered; but A, in answer to an action for such failure to deliver, averred, that "on or about the 6th of said month" he tendered them to B, who refused to receive them, to which answer B replied, that when A brought the hogs into the vicinity of L, he informed B of the fact, and, also, that said hogs were not such as filled the contract as to weight, but that he was ready to deliver them, and thereupon B refused to receive them; and that on the 10th of December, 1857, A purchased other hogs of other persons, which were sufficient in weight, and tendered them, which B then also refused to receive.

Held, that in view of the shortness of the pork season, and the great importance of promptness in the delivery of hogs, A should have offered to deliver the hogs sooner than he did, and B was under no obligations to receive them for that reason, and for the further reason that they were not of sufficient weight, and much less was he bound to wait for A to purchase the hogs of others to fill his contract, after having been notified to deliver them.—*Murphy et al. v. Toner,* 228

12. Action on a note for one thousand dollars. *Answer*: That the note was executed in part performance of the following contract: "I have this day sold to B and H four thousand fleeces of wool, more or less, at forty-nine cents a pound; wool to be washed on the sheep, to be put up in good merchantable order, free from tags, to be delivered in Springfield, at the depot of the *Great Western Railroad*, on the 20th of July, 1857. Received on the above contract one hundred and seventy-five dollars. Balance to be paid in cash on the delivery of the wool, except one thousand dollars, for which a note, payable at ninety days, is to be given;" and that there was a breach of the contract by the plaintiff, in his failure to deliver wool answering to the terms of the contract, and relying upon the contract as a warranty.

Held, that the contract did not contain a warranty, but an executory agreement to deliver washed wool, but that, if the wool had been present and delivered at the time of the execution of the contract

it would have amounted to a warranty that the wool delivered was of the quality specified in the contract.—*McConnell et al. v. Jones et al.*, 328

13. Where a transfer of real estate, or any interest therein, is defective in form, the transferee can not, for that reason alone, recover back the money paid therefor, but must first demand a correction of the error in the transfer.—*Johnson v. Houghton*, 359

14. A contract can not, either for mistake or fraud, be rescinded in part, and affirmed in part, but must be rescinded *in toto*, or not at all. *Ibid.*

15. The law, as to penalties and costs, in force at the time of rendering judgments, governs.—*Free v. Haworth*, 404

16. But, as to the obligation of the contract, the law of its date, if to be executed where it is made, generally controls. *Ibid.*

CONSTITUTIONAL LAW.

See STATUTES CONSTRUED, 2. CITIES, 3, 4. CRIMINAL LAW AND PRACTICE, 13.

1. The office of colonel of volunteers, as now existing, and the office of reporter of the decisions of the Supreme Court of *Indiana*, within the meaning of the ninth section of the second article of the constitution of said State, are lucrative offices.—*Kerr v. Jones*, 351

2. The office of colonel of volunteers in the military service of the *United States*, as now organized, is not an office in the militia. *Ibid.*

3. The acceptance, therefore, of the latter office, by the incumbent of another lucrative office, under the laws of *Indiana*, would vacate the former. *Ibid.*

4. In 1828 the legislature of *Indiana*, by law, constituted certain persons seminary trustees for the county of *Switzerland*, for the special purposes in the act mentioned; among which were the selection of a site for a county seminary, the procurement of title thereto by donation or purchase, the solicitation of donations of lands, money, or property, to aid in the establishment of such a seminary, the preparation of a plan for the erection and management thereof, and to report their proceedings to the legislature. In 1834, the legislature passed an act to incorporate the seminary, referring, in its preamble, to the former act, appointing trustees, and their report, and petition for a charter for said seminary, and the last-named act constitutes A, B, and others, and their successors in office, trustees of the *Switzerland County Seminary*, with power to sue and be sued, plead and be impleaded, answer and be

answered unto, contract and be contracted with ; to hold estates, real and personal, by gift, grant, contract, bequest, devise, or otherwise, and, to all intents and purposes, to be a body politic and corporate, to have perpetual succession, to have a common seal, and the same to change at pleasure. It was, in said charter, made the duty of said trustees to erect and establish a seminary in said county, and conduct the same upon some approved plan, so as to secure to the greatest possible number of the children of said county, at the least possible expense, the advantages thereof. In April, 1834, C conveyed to said trustees, by way of donation, a site for said seminary, and said trustees erected and established the same thereon.—*Edwards v. Jagers et al.*, 407

The constitution of the State of *Indiana*, adopted in 1851, by sec. 2, of art. 8, provided for the sale of county seminaries, and the property held by them, for the purpose of organizing a general and uniform system of common schools, and the legislature, in 1852, in pursuance of said constitutional provision, enacted a law prescribing the manner in which said seminaries and property should be sold, and, in 1854, in the manner prescribed by said law, the *Switzerland County Seminary* was sold to D, who received a conveyance therefor, and instituted his suit for the possession thereof.

Held, that by reason of the provision in the tenth section of the first article of the constitution of the *United States*, prohibiting any State from passing any law impairing the obligations of contracts, the provision in the constitution of the State of *Indiana*, authorizing the sale of said seminaries, and the law enacted in pursuance thereof, as to said *Switzerland County Seminary*, are unconstitutional and void, and that said purchaser acquired no title by said sale.

5. *Semble*, that it is not competent for the legislative power to declare what shall be conclusive evidence of a fact.—*Wantlan v. White*, 470

COUNTY.

1. A county is a corporation, with power to contract debts.—*The Board, etc. v. Day*, 450
2. Debts of a county, evidenced by ordinary county orders, payable to A, or bearer, do not stand on the footing of those contracted under a special grant of power. *Ibid.*
3. A corporation is a person, and a county is a corporation, and it will be presumed that the county auditor, in drawing orders, did his duty, and that such orders were given upon a consideration, until the contrary appears, and such orders will constitute a *prima facie* cause of action. *Ibid.*

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1. Where the holder of a note, which is past due, for a new and valuable consideration received by him, agrees to forbear to bring suit upon the note, and violates such agreement, such breach can not be made available by way of counterclaim.—*Newkirk v. Neild*, 194

CORPORATIONS.

*See RAILROADS, 3. PLEADING, 27, 28, 29.**See ESTOPPEL, 5, 6, 7.*

1. If a corporation had once a legal existence, which is alleged to have been determined, it is necessary that the pleading should show and set forth particularly the manner in which its corporate powers ceased.—*Sutherland v. The Lagro and Manchester Plank Road Company*, 192
2. A corporation may be required to answer, as a judgment-debtor, in proceedings supplementary to execution.—*Tompkins et al. v. The Floyd County Agricultural and Mechanical Association et al.*, 197
3. Persons holding assets of a corporation, which is a judgment-debtor and defendant, may be compelled to answer as to such assets, in a proceeding supplementary to execution. *Ibid.*
4. Where the rights of a corporation are derived from a public law, the fact that the agents of the corporation, in order to induce others to contract with it, or subscribe to its capital stock, made

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5. As to what will constitute sufficient articles of association for the formation of a corporation, see *Wert v. The Crawfordsville, etc. Railroad Company*, 242

6. A county is a corporation, with power to contract debts.—*The Board, etc., of Floyd County v. Day*, 450

7. A corporation is a person, and a county is a corporation, and it will be presumed that the county auditor, in drawing orders, did his duty, and that such orders were given upon a consideration, until the contrary appears; and such orders will constitute a *prima facie* cause of action. *Ibid.*

COURT OF COMMON PLEAS.

See JURISDICTION, 2.

1. The 11th section of the Common Pleas Act has not been so far repealed, by implication, as that it may not be the subject of amendatory legislation. It has only been modified, not repealed.—*Mitchell v. The State*, 381

CRIMINAL LAW AND PRACTICE.

1. If a jury, in a criminal case, retire to consider of their verdict, in the charge of a bailiff who has taken a general oath to discharge his duties as such, and they afterward return a verdict, the same will not be disturbed because the bailiff's oath was not in the precise form prescribed by law.—*Hittner v. The State*, 48

2. It is not error, on the trial of a prisoner for murder, to permit the State to prove that he attempted, while in jail, to escape, but was retaken. *Ibid.*

3. On the trial of a defendant on an indictment for murder, it is error to charge the jury, without qualification, that, if the defendant made an unlawful attack, or got into a fight with the deceased, upon a sudden heat, and slew him in the controversy, he would be guilty of manslaughter, at any rate, because, even under such circumstances, the defendant would be entitled to the benefit of any retreat, flight, or withdrawal from the contest which he might, in good faith, have made, or attempted to make, although he was the aggressor in the first instance. *Ibid.*

4. A record in a criminal case, based upon an indictment which fails to show the impanneling of a grand jury, and the return by them of the indictment into court, indorsed a *true bill*, and signed by

their foreman, can not sustain a conviction on such indictment.—
Conner v. The State, 98

5. The temperance law of 1859 prescribes no penalty against the sale of intoxicating liquor, in quantities of one quart or more, on Sunday.—*The State v. Thomasson,* 99

6. An indictment for unlawfully selling liquor without license should charge that the liquor sold was intoxicating. *Ibid.*

7. In a prosecution for murder, if the jury, upon the whole evidence in the cause, have a reasonable doubt whether the defendant was sane when he committed the homicide, they must also, and for that reason, have a reasonable doubt whether he purposely and maliciously committed the crime, because, without sanity, the crime, as defined by the statute, can not be committed. *Hanna, J., dissenting.—Polk v. The State,* 170

8. The record, in a criminal prosecution upon indictment, should show that the indictment was returned into court by the grand jury, and identify it, by some entry from the record of the lower court, describing it by the time of its filing, and its number, or otherwise.—*Springer v. The State,* 180

9. Where the jurisdiction of the Common Pleas to try for a felony is based upon the fact that the defendant is in custody, the information must show that the crime for which he is prosecuted is the same for which he is in custody.—*Roberts v. The State,* 180

10. The words, "If any person shall disturb any religious society, or any member thereof, when met or meeting together for public worship," shall be fined, etc., in section 37 of the Act defining Misdemeanors, etc., are void for uncertainty, so far as they attempt to create and define a crime or misdemeanor.—*Marvin v. The State,* 181

11. Informations for felonies must aver the existence of the facts necessary, to give the Court of Common Pleas jurisdiction to try the case.—*Smith v. The State,* 227

12. When a prisoner is on trial for murder, and one of the jurors becomes sick, and asks to be discharged, and the prisoner refuses to consent to such discharge, and the Court, without any sworn statement from the juror, as to his condition, or any evidence of any physician on the subject, discharges the jury, such discharge will be a bar to a retrial of the prisoner.—*Rulo v. The State,* 298

13. This Court does not judicially know that wine is not intoxicating, and will not question the right of the legislature to declare it to be intoxicating.—*Jackson v. The State,* 312

14. In all prosecutions for crime, the proof must be so certain as clearly to establish the jurisdiction of the court. *Ibid.*

15. An information for larceny, which avers, "that the defendant is now confined in the jail of *Floyd* county, charged with the felony herein set forth, and that he has not been indicted by any grand jury of said county," is sufficient to show jurisdiction in the Court of Common Pleas to try the cause.—*Mitchell v. The State*, 381

16. A person, who, out of the State of *Indiana*, becomes accessory before the fact to a felony committed within the State, can not be punished therefor under the laws of this State.—*Johns v. The State*, 421

17. Section 2 (2 R. S., 1852, p. 361,) of our criminal code must be construed to embrace only persons who, without the State, commit a crime, which, in legal contemplation, is to be deemed as having been committed within the State, under circumstances which will make the person thus committing it a principal in the crime. *Ibid.*

18. An information which charges that the defendant, within two years of the commencement of the prosecution, did, knowingly, encourage a negro, named A B, who had come into the State about the 1st of December, 1860, to remain in the State, by giving him employment, and furnishing him a home, is good, and not subject to be quashed.—*The State v. Curzy*, 430

19. Where a defendant, in a prosecution for bastardy, has a preliminary hearing before a justice on a certain day, which is also the first day of the term of the Circuit Court for the county, he should be recognized, if at all, to appear at the next, and not the then present, term of said court.—*Parlan v. The State, etc.*, 455

20. It would, therefore, be irregular and improper to docket the prosecution, and assign it for a day of the then present term, and proceed to call the defendant, take defaults, forfeit recognizances, etc. *Ibid.*

DAMAGES.

See MORTGAGE, 4. *LANDLORD AND TENANT*, 1. *CITIES*, 2, 3, 4.

DEED.

See VENDORS AND PURCHASERS, 4.

DEMAND.

See PROMISSORY NOTES, 5.

DEMURRER.

See PRACTICE, 1, 10, 11, 12.

1. A demurrer to a complaint on an administrator's bond, assigning

several breaches, one of which is well assigned, should be overruled.—*Whitehall v. The State ex rel.*, 27

2. Where an answer consists of several paragraphs, and a single demurrer is filed thereto, in which the plaintiff says, “he demurs to *each* paragraph of the answer,” etc., the demurrer must be taken distributively, and is equivalent to a separate demurrer to each paragraph, and may, therefore, be overruled as to part, and sustained as to part of the paragraphs.—*Parker v. Thomas*, 213

DESCENT.

1. The word “ancestor,” in section 114, p. 436, R. S., 1845, must be construed to embrace all persons from whom a title by descent could be derived, under any circumstances; that is, to be synonymous with *kindred*.—*Greenlee v. Davis*, 60

2. Since 1853, upon the death of a wife, testate or intestate, leaving a widower, he is entitled to one-third of her estate, both real and personal, subject to his proportion of the debts of the wife contracted before marriage.—*Noble's Executrix v. Noble*, 431

DITCHING COMPANIES.

Collection of Assessments. See PLEADING, 51.

EASEMENT.

See LICENSE, 1, 2.

1. The right in one to overflow the land of another is an easement, and it is an interest in real estate, and title to such easement must be conveyed by grant, and established by proof of actual grant, or of prescription, from which a grant will be inferred.—*Snowden v. Wilas*, 10

ELECTIONS TO FILL VACANCIES.

See OFFICES, 1, 2, 3, 4.

ELECTION BY WIDOW TO TAKE UNDER THE LAW AND
REJECT THE WILL.

See WILL, 5, 6, 7.

ESTOPPEL.

1. If a person, having title to an estate, which is offered for sale, and, knowing his title, *stand by*, and encourage the sale, or do not forbid it, and thereby another is induced to purchase the estate,

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under the supposition that the title is good, the person *so standing by*, and being silent, shall be bound by the sale, and neither he, nor his privies, shall be allowed to dispute the purchase.—*The Junction Railroad Company v. Harpold*, ✓ 347

2. But, if the person having the adverse claim is not apprised of his rights, or the purchaser knows them to exist, these principles do not apply. *Ibid.*
3. Representations, by the payer of a note, that it is all right, and will be paid, made to a purchaser of said note, *after* he has become the owner thereof, shall not operate as an estoppel against the payer, nor can such representations, repeated by the purchaser thereof to any person to whom *he* may sell the same, have such effect in favor of such second purchaser.—*Jones v. Dorr*, 384
4. Where the articles of association of a railroad company are defective, in not specifying with sufficient certainty the terminus of the road, but they are properly filed in the office of the Secretary of State, such filing is notice to the State of such defect, and the State neglects, for eight years, to take advantage thereof, by *quo warranto*, or otherwise, the right thereafter to do so must be considered lost.—*The State ex rel., etc. v. Baily et al.*, 462
5. Estoppels arise upon matters of fact, and not upon matter of law.—*Snyder v. Studebaker*, 462
6. If there was no law which authorized a supposed corporation, or, if the statute authorizing it was unconstitutional and void, a contract with such corporation would not estop the party making it, to dispute the existence of the corporation. *Ibid.*
7. But, if there was a law which authorized the corporation, then, whether the corporation had complied with it, so as to have become legally incorporated, is a question of *fact*, and a party contracting with such corporation is estopped to dispute the organization, or the legal existence of the corporation. *Ibid.*

EXECUTIONS.

See WILLS, 4. *See SHERIFF'S SALES*, 6, 7, 8, 9, 10.

1. To determine the time when, after the stay of a judgment, an execution may issue, the day on which the replevin bail is entered should be counted.—*Tucker v. White et al.*, 253

EXECUTORS AND ADMINISTRATORS.

See PRACTICE, 4, 5.

1. In a doubtful case, where the Court of Common Pleas removes an executor, administrator, or guardian, this court will not interfere,

by reason of the large discretion given to that Court in such matters.—*Whitehall v. The State, etc.* 30

2. An administrator, having advanced his own funds in payment of the demands against his intestate's estate, thereby acquires no right of action for money thus voluntarily advanced, against the heirs of the estate.—*McClure v. McClure*, 185

3. The administrator or executor of a deceased fraudulent assignor of choses in action may recover such choses in action, or their value, from the fraudulent assignee, for the purpose of applying the proceeds to the payment of the debts of the assignor, but to do this, he must allege and prove that the proceeds thereof are necessary to pay said debts; and such personal representative can not recover, as aforesaid, for the purpose of distribution to the heirs of such assignor, because such assignment, although fraudulent, is good against the assignor and his heirs.—*Hess et al. v. Hess' Administrator*, 238

4. Where an action is begun in the name of an administrator, and before its determination he dies, and the name of an administrator, *de bonis non*, is substituted as plaintiff, objections to the manner of the appointment of the latter can not be noticed in this court, unless they were properly brought to the attention of the court below.—*Mahon v. Mahon's Administrator*, 324

EVIDENCE.

See BASTARDY, 3. ADMISSIONS, 1. NEW COUNTY, 2. FORMER RECOVERY.

1. The best and only legitimate evidence of the value of land at the time of its sale, is the opinion of witnesses who have personal knowledge of the land, and, from their own observation, have become acquainted with its value.—*Crouse v. Holman*, 30

2. In an action against a railroad company to recover the value of a lost trunk, the *ex-parte* affidavit of the plaintiff is not competent evidence to prove the contents of the trunk, but the plaintiff himself is a competent witness for that purpose.—*The Indiana Central Railroad Co. v. Gulick*, 83

3. Suit by a physician, against his patient, for professional services, consisting of visits, for which the physician demanded to be paid at the rate of one dollar and fifty cents per visit.

On the trial, the defendant offered to prove, that before, and at the commencement of the account sued on, the plaintiff had been his family physician, and had charged him for previous and similar services and treatment, including medicines, at rates not lower than fifty cents, or over one dollar and twenty-five cents per visit, and that no contract was made as to the price to be charged for the services now sued for.

Held, that such proof was competent, as tending to establish an implied contract as to the prices to be charged for the services sued for.—*Sidener v. Fetter*, 310

4. A question, addressed to a witness, which merely calls for an opinion, instead of a statement of facts, upon which a verdict should be based, should be suppressed; but if the answer to such question was such as could do no harm to the adverse party, this Court will not reverse the judgment by reason of the refusal to suppress the question.—*The New Albany, etc. Railroad Co. v. Huff et al.*, 315

5. Where the ground of a defense is alleged false representations, made to induce the defendant to execute a note, it is not competent for him to prove that the same representations were made to another, in order to show that they were made to him, because representations, which had no effect in procuring the execution of the note, would be inoperative.—*Corbin et al. v. Hack*, 459

FERRY RIGHT.

1. The mere fact that parties claiming and using a ferry right had not regularly paid the license therefor, would not be available, as a defense, to one who should disturb those who possessed the right, or who should destroy or injure the same, but might, perhaps, be a ground for proceedings to declare the same forfeited.—*The New Albany, etc. Railroad Co. v. Huff et al.*, 315

FORMER RECOVERY.

1. The defense of *former recovery* can not be given in evidence under the general issue.—*Brady v. Murphy*, 258

FORECLOSURE.

See JUDGMENT BY CONFESSION, 2. MORTGAGE, 7.

1. A mortgagee, who has already recovered a personal judgment against the mortgagor, on the note secured by the mortgage, may afterward prosecute his suit for foreclosure upon the note and mortgage, and recover another personal judgment, in connection with his decree in foreclosure, against the mortgagor, the amount of which latter judgment may be measured by the note, or the former recovery upon it.—*Duck v. Wilson*, 190

1. It is error, in an action against husband and wife, to foreclose a mortgage, to render a personal judgment against the wife for any deficiency after the sale of the mortgaged property.—*Gebhart v. Hadley*, 270

3. In a complaint for foreclosure, by the mortgagee against the mortgagor alone, it is not necessary to aver that the mortgagor has not sold the land, or that the mortgage has been acknowledged or recorded.—*Perdue v. Aldridge*, 270
4. In an action to foreclose a mortgage, where some of the proceedings may be irregular, but the result of the action is such that no party is injured, or has any cause to complain, this Court will not very closely examine the alleged irregularities.—*Louden et al. v. Dickerson et al.*, 387
5. A suit commenced to foreclose a mortgage, in the proper county, would not be defeated by the division of the county afterward.—*Buckingham v. Gregg*, 401
6. On a foreclosure, where there is no order or judgment over, for any deficiency that may remain after the sale of the property mortgaged, there is no personal judgment. *Ibid.*

FRAUD.

See PLEADING, 3, 4.*See SALES*, 1. *JUDGMENT*, 1.

FRAUDULENT CONVEYANCES.

See SALES, 1. *EXECUTORS AND ADMINISTRATORS*, 8.

1. The transfer of a part or all of his property, either directly, or by way of confession of a judgment and levy of an execution, by a debtor, in failing circumstances, for the purpose of paying one debt, leaving many others unpaid or unsecured, if done in good faith, unaffected with any secret trust, is valid, although done in contemplation, and but a few days before the execution, of a general assignment by the debtor.—*Lord v. Fisher*, 7
2. The fact that the creditor had notice of the debtor's intention to make an assignment, would not render fraudulent a conveyance or lien obtained by him simply for the purpose of securing an honest debt. *Ibid.*

GUARDIAN AND WARD.

1. A married woman is competent to be appointed guardian, but, before her appointment, it should appear to the Court that her husband consents thereto, and that not only she, but her husband also, is a suitable person to act as guardian.—*Ex Parte Maxwell*, 88

HABEAS CORPUS.

Writ of. See WANTLAN v. WHITE.

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HIGHWAYS.

1. Where, in an application for a change or location of a public highway, before the board of commissioners of the county, the final order of the board, directing the change, is defective for uncertainty, such defect may be remedied by a motion for that purpose, but it is not a ground for the dismissal of such application.—*Daggy v. Coats*, 259
2. On appeal to the Court of Common Pleas, in such cases, no ground in favor of, or against, the proposed highway, can, as a matter of right, be there filed or urged; but the cause must be there tried on the papers on which it is tried in the Commissioner's Court, and no new viewers, or reviewers, can be applied for, or appointed, unless by mutual consent. *Ibid.*
3. In such case, also, the necessary papers in the cause, such as the petitions, reports of viewers, or reviewers, remonstrances, etc., which must be before the Appellate Court, are operative to make a *prima facie* case for the party in whose favor they are, and it would be the province of the Court to decide upon their sufficiency; and if the objectors had appeared below, and made objections, and had reviewers appointed, who had reported, such report becoming a part of the original papers in the Appellate Court, the original notices required to be given of the application would be thereby admitted or waived. *Ibid.*
4. In such case, on the trial in the Appellate Court, the petitions, remonstrances, reports, etc., which constitute the papers on which the cause must be tried, need not be given in evidence, but should be judicially noticed by the Court, and read or stated to the jury trying the cause. *Ibid.*
5. In applications for the location or change of public highways, pending in the Common Pleas or Circuit Court, on appeal from the board of commissioners, all errors not properly presented to the Court of Commissioners will be considered by the Appellate Court to have been waived.—*Shafer v. Bardener*, 294
6. Where viewers report that a proposed location, or change, of a public highway, will not be of public utility, it is not competent for the appellate, or inferior court, to order such location, or change, to be made. *Ibid.*

HUSBAND AND WIFE.

See FORECLOSURE, 2.

1. Where a note is made payable to an unmarried woman, and she afterward marries, and transfers the note, by delivery merely, as a

gift, to her husband, he may maintain an action on the same as his own.—*White v. Callinan*, 43

IMPEACHMENT OF WITNESS.

1. Testimony for the impeachment of a witness should go to his character at the time of the trial.—*Rogers v. Lewis*,

INDIANS.

See MARRIAGE, 1, 2

1. The *Miami* tribe of *Indians* is not a nation, or independent people, between which and ourselves the principles and regulations of international law can apply, or be enforced.—*Roche v. Washington*, 53

INDICTMENT.

1. An indictment for unlawfully selling liquor, without license, should aver that the liquor sold was intoxicating.—*The State v. Thomasson*, 99

INFANT.

Enlistment of, as a volunteer. *See VOLUNTEERS*, 1, 2, 3, 4, 5.

INFORMATION.

1. Where the jurisdiction of the Common Pleas to try for a felony is based upon the fact that the defendant is in custody, the information must show that the crime for which he is prosecuted is the same for which he is in custody.—*Roberts v. The State*, 180
2. Informations for felonies must aver the existence of the facts necessary to give the Court of Common Pleas jurisdiction to try the case.—*Smith v. The State*, 227
3. An information for larceny, which avers, "that the defendant is now confined in the jail of *Floyd* county, charged with the felony herein set forth, and that he has not been indicted by any grand jury of said county," is sufficient to show jurisdiction in the Court of Common Pleas to try cause.—*Mitchell v. The State*, 381
4. An information which charges that the defendant, within two years of the commencement of the prosecution, did, knowingly, encourage a negro, named A B, who had come into the State about the 1st of December, 1860, to remain in the State, by giving him employment and furnishing him a home, is good, and not subject to be quashed.—*The State v. Curry*, 430

INJUNCTION.

1. If a complaint fail to state facts sufficient to entitle the plaintiff to the relief prayed for, he will not be entitled to an injunction, or temporary restraining order, and the dissolution of either will not be error.—*Sutherland v. The Lagro and Manchester Plank Road Company*, 192

INSTRUCTIONS TO THE JURY.

See PRACTICE, 35, 36. *JURY*, 1.

1. Where a person, pending an action against him for the collection of a debt, and on the day on which final judgment is rendered therein against him, but before the rendition of the judgment, conveys all his real estate, in four different parcels, to as many different grantees, for the consideration, expressed in each deed, of three hundred dollars, and his wife receives in return a conveyance of a tract of land from one of them, and such judgment-creditor seeks to set aside said deeds as fraudulent, it would not be proper for the Court to instruct the jury, that, "the deeds, on their face, import a fair transaction," because such instruction might mislead the jury.—*Adams et al. v. Sater et al.*, 418

INTEREST.

See STATUTES CONSTRUED, 2. *USURY*, 3.

1. A note, made payable at a place in another State, and bearing a higher rate of interest than is lawful in this State, but not a higher rate than is allowed by the law of the place where it is payable, may be enforced in this State according to its tenor.—*Lines et al. v. Mack et al.*, 223

2. In rendering judgment on money demands, it is proper to render the judgment for the aggregate amount of the principal and interest due at the date of the judgment, and the same will bear interest from date.—*Stanton v. Woodcock*, 273

INTERROGATORIES.

1. Where a party requests, at the proper time, that the jury shall be required to return answers to special interrogatories, it is the duty of the Court to propound to them such interrogatories as shall be applicable to, and embrace the issues and legitimate evidence in the cause, so as not to withdraw from their consideration any part of either.—*Noble v. Enos*, 72

2. If the answers of the jury to any such interrogatories are not appropriately responsive thereto, there should be a motion in the

court below to make them more direct; or, in some other proper mode, to remedy such defect, or such errors will not be available in this court. *Ibid.*

3. A party to an action, who has complied with an order to answer interrogatories, may also be compelled to appear and testify as a witness, at the instance of the party propounding the interrogatories.—*Smith v. Roseham*, 256

JUDGMENT.

See PRACTICE, 29, 40. *PRACTICE IN THE SUPREME COURT*, 16. *SHERIFF'S SALES*, 10.

1. In an action against a railroad company, for damage occasioned to the plaintiffs by the erection of the road, where a general verdict was returned for the plaintiffs, the facts, that the railroad company had employed competent engineers, and had done no willful or unnecessary damage, would not entitle the defendant to a judgment, *non obstante veredicto*, because the road may have been located, and the work performed, with the utmost care, and yet damage may have resulted to the plaintiff.—*The New Albany, etc. R. R. Co. v. Huff et al.*, 315

2. On a foreclosure, where there is no order or judgment over, for any deficiency that may remain after the sale of the property mortgaged, there is no personal judgment.—*Buckingham v. Gregg*, 401

JUDGMENT BY CONFESSION.

1. Where a warrant of attorney authorizes A, or any other attorney of the court in which the judgment is to be confessed, to appear and confess a judgment, and A, and B, another attorney of said court, appear and confess the judgment, the same will be valid.—*Patton v. Stewart*, 233

2. Where a warrant of attorney to confess a judgment and decree of foreclosure upon a mortgage and notes, in part due, and in part not due, provides that, "in the final judgment herein, the Court shall decide upon what subsequent default execution shall issue herein to collect the balance, in case the defendants shall pay the amount [installment] due, before the sale of the premises; and that, in case of sale, the whole of the plaintiff's debt and costs be paid; and the residue, if any, be paid to the defendants; and that they (the defendants) fix what parts, if the same be susceptible of division, be first sold," such warrant places the judgment, confessed in pursuance thereof, upon the footing of one where the installments are all due, and the Court need make no inquiry touching the divisibility of the mortgaged property, and the sale should be for the entire amount of the debt; and it is the business

of the parties interested in the property, and the sheriff, to determine upon the divisibility of the premises.—*Patton v. Stewart*, 233

3. Before a judgment can be rendered against a person, on the agreement of his attorney, where the person does not personally appear, and has not been personally summoned, the attorney must produce and prove written authority from his client, to consent to such judgment.—*Jarrett v. Andrews*, 403

JUDICIAL KNOWLEDGE.

See PRACTICE IN THE SUPREME COURT, 23, 24.

JURY.

1. The jury should receive their charge, and all subsequent instructions or explanations touching their duties, in open court, in the presence of the parties.—*Smith v. McMillen*, 391

JUSTICE OF THE PEACE.

1. The clerk's certificate to the official character of a justice of the peace should show that he was, at the time when the proceedings were had, or judgment was rendered, a justice of the peace, duly commissioned and qualified to act as such.—*Dresser v. Wood*, 199

JURISDICTION.

1. In a complaint, the amount demanded in the prayer is the criterion of jurisdiction, and the same rule applies to a defense by way of set-off.—*Pate v. Shafer*, 173

2. Where the jurisdiction of the Common Pleas to try for a felony is based upon the fact that the defendant is in custody, the information must show that the crime for which he is prosecuted is the same for which he is in custody.—*Roberts v. The State*, 180

3. A plea to the jurisdiction should be verified, and if not verified, should be disregarded; and if, such plea having been disregarded in a cause pending before a justice of the peace, the defendant plead to the merits, he waives all questions of jurisdiction over his person, and such questions can not be raised on appeal to the Common Pleas or Circuit Court, by amendment or otherwise.—*Storm v. Worland*, 203

3. The Circuit Court of one county has no jurisdiction to adjudicate upon the title to land in another county, where no part of the land, the title of which is involved in the action, is situated in the county of the forum.—*The New Albany, etc. R. R. Co. v. Huff*, 444

LANDLORD AND TENANT.

1. In an action for damages, on account of an eviction by a landlord of his tenant, from leased premises, before the expiration of the lease, it is competent for the tenant to give evidence of the improvements he had placed upon the premises before expulsion, rendering them more productive, for the purpose of showing the extent of his damage.—*Ricketts v. Losletter*, 125
2. Where the widow of a decedent is in the possession and control of his real estate, and leases the same for a stipulated rent, and before the rent becomes due, under the terms of the lease, such real estate is partitioned between the widow and other heirs of the decedent, the tenant is only accountable to the said widow and heirs, respectively, for the rent, in the proportions in which they severally take the real estate, and not to the widow for the whole.—*Murray et al. v. Mounts et al.*, 364

LAW GOVERNING CONTRACTS.

See CONTRACTS, 15, 16.

LEASES.

See LANDLORD AND TENANT, 2.

LICENSE.

1. A license to enter upon and occupy land for any purpose must be specially pleaded, both at common law and under the code, or the same can not be given in evidence without consent, and such consent will not be presumed.—*Snowden v. Wilas*, 10
2. If a license to do an act upon the land of another do not involve an interest in real estate, or necessarily amount to an easement, it may be given by parol, and if coupled with an interest, or if it be upon a consideration, it can not be revoked. *Ibid.*
3. In equity, the future enjoyment of an executed parol license, granted upon a consideration, or upon the faith of which money has been expended, will be enforced, at least, where adequate compensation in damages could not be obtained. *Ibid.*
4. And in such cases, grantees as well as the original parties, are bound, where they purchase with notice, and in the case of a mill-dam, the existing condition of things might be notice to them of the equity. *Ibid.*
5. Suit for overflowing land. The defendant answered, setting up an unsealed and unacknowledged, but signed and recorded, contract in

writing, made between the plaintiff's grantor and others, and the defendants, as follows: "Whereas, A, B, and C, contemplate erecting a dam across the *Tippecanoe river*, about six miles below *Winnamac*, near B's, on, etc., in section 9, etc., and contemplate the erection of mills below said dam, to the hight of six feet; and whereas, we, the occupants and owners of lands adjoining and contiguous to said proposed dam, and to the river above said dam, likely to be affected by back-water from said project, and erection of such proposed mills, of public utility; therefore, to encourage the said A, B, and C, in such undertaking, we do hereby assent and agree, that said men, or any of them, or their substitutes, or assigns, or heirs, may erect such dam, to the hight aforesaid, and for ourselves, and heirs, and assigns, do waive and release all damages that may ensue from the erection of such dam, and from back-water caused by the dam;" and further averred, that, under it, the dam and mills, costing thirteen thousand dollars, were erected; that one thousand dollars had been expended on the dam at the time the plaintiff purchased the land; that he had notice, and stood by and saw said expenditures, and paid one thousand five hundred dollars, etc., of said purchase money, after said work was completed, etc.

Held, that said answer set up a good bar to the action.—*Stephens et al. v. Benson*, 367

LIEN.

See TAXES, 1.

See VENDOR'S LIEN FOR PURCHASE MONEY, 1, 2, 3.

1. The act of January 27, 1853, supplemental to an act concerning liens of mechanics, etc., only applies to persons whose business it is to feed cattle, etc., and was not intended to include an isolated case of feeding, etc.—*Conklin v. Carver*, 226

LIMITATIONS.

1. The statute of limitations applicable to suits upon contracts in writing does not operate until the party has a right to apply to the proper tribunals for relief in the particular case.—*Atherton v. Williams*, 105

LUCRATIVE OFFICES.

1. The office of colonel of volunteers, as now existing, and the office of reporter of the decisions of the Supreme Court of *Indiana*, within the meaning of the ninth section of the second article of the constitution of said State, are lucrative offices.—*Kerr v. Jones*, 351
2. The acceptance, therefore, of the office of colonel by the incumbent of another lucrative office, under the laws of *Indiana*, would vacate the former. *Ibid.*

MARRIAGE.

1. A contract of marriage, formed in *Indiana*, between residents of the State of *Indiana*, to be valid, must conform to the laws of *Indiana*.—*Roche v. Washington*, 53
2. A marriage between a male and female of the *Miami* tribe of *Indians*, formed according to the customs of the tribe, while the parties to it were residents of the State of *Indiana*, can not be recognized as a valid marriage under the laws of *Indiana*. *Ibid.*

MARRIED WOMEN.

See WILL, 1, 3. GUARDIAN AND WARD, 1. MORTGAGE, 7.

1. The contracts of a married woman, in the employment by her of counsel to protect her rights and interests in connection with her property, are valid, and binding upon her, and the claims against her arising out of such contracts may be made a charge upon her property, and payment thereof enforced.—*Major v. Symmes*, 117
2. The clause of the statute forbidding a married woman to incumber or convey her real estate, except by deed, in which her husband shall join, relates to such direct acts of conveyance or incumbrance as previously required the consent of the husband to perfect. *Ibid.*
3. *Sembler*, that a married woman may, on general principles, bind her separate estate to pay debts contracted for the benefit thereof. *Ibid.*
4. A married woman can not bind herself by merely signing a warrant of attorney to confess a judgment; and her acknowledgment of the same before the clerk of the county court gives it no validity, as he is not authorized to take such acknowledgment.—*Patton v. Stewart*, 233

MILL-DAMS.

See LICENSE, 1, 2, 3, 4.

1. *Quare.* Whether the present statute on the subject of assessment of damages for property taken or injured for public use, (which includes public works and mill-dams), does not limit the mode of redress for injury done by the erection of a mill-dam to that provided in the statute?—*Snowden v. Wilas*, 10

MISTAKES, CORRECTION OF.

1. A merely voluntary executory contract for the conveyance of land will not be specifically enforced; nor will a voluntary deed be corrected of mistakes, on the application of the grantee against the grantor; but it will be on the application of the grantor against the grantee, where, by mistake, the conveyance is for a larger estate than was intended.—*Randall v. Ghent*, 271

MORTGAGE.

1. Where a mortgage is given upon real estate, to secure the payment of a debt, and the mortgagee, by the terms of the mortgage, has acquired the right only to look to the land for payment, he could transmit to another, by way of subrogation, no greater right than he had acquired.—*Fairman's Administrator v. Heath*, 63
2. Although a mortgagee, holding several notes secured by the same mortgage, which mature at different times, and one of which is due, may foreclose as to all, yet he may institute his suit to foreclose alone as to the note due; and if he do not prosecute but one such suit at the same term of court, he shall recover costs in each successive foreclosure.—*Crouse v. Holman*, 30
3. A judgment of foreclosure on one such note can not be pleaded as a bar to a subsequent suit, on the same mortgage, to enforce payment of another note, because said notes may properly be considered as so many successive mortgages, and successive causes of action. *Ibid.*
4. Where one person executes a mortgage upon his own land, for the accommodation, and to secure the debt, of another person, and takes from the latter a bond conditioned that he "would pay and satisfy the mortgage, together with all interest and costs thereon, accrued, accruing, and to accrue, and, in every respect, save the mortgagor harmless, and without loss in the premises," and the latter fails to pay the mortgage debt, and suffers the mortgaged property to be sold to pay the same, and thereby lost to the mortgagor, the proper measure of damages to which the mortgagor is entitled is the value of the mortgaged property at the time it was sold.—*Atherton v. Williams*, 105
5. The surrender of a mortgage, voluntarily, on a fair contract for other security, is an abandonment of the same, and does not revive the equitable lien.—*Mattix v. Weand*, 151
6. A mortgagee, who has already recovered a personal judgment against the mortgagor, on the note secured by the mortgage, may afterward prosecute his suit for foreclosure upon the note and mortgage, and recover another personal judgment, in connection with his decree in foreclosure, against the mortgagor, the amount of which latter judgment may be measured by the note, or the former recovery upon it.—*Duck et al. v. Wilson et al.*, 190
7. A vendor's lien for the purchase money, of land sold by him, is paramount to the title of the wife by virtue of the marriage; but the wife, upon the foreclosure of a mortgage given to secure the payment of purchase money, in which she joined with her husband, is entitled to redeem, and no personal judgment can be taken against her on such foreclosure.—*Patton v. Stewart*, 233

8. A mortgage is a valid security between a mortgagor and a mortgagee, without acknowledgment or record, except that, to bind a *femme covert*, it must be acknowledged by her.—*Perdue v. Aldridge*, 290 *I*

9. In a complaint for foreclosure, by the mortgagee against the mortgagor alone, it is not necessary to aver that the mortgagor has not sold the land, or that the mortgage has been acknowledged or recorded. *Ibid.*

10. Real estate is first mortgaged to secure school funds, and then to A to secure a debt, then B recovered a judgment against the mortgagor, and, on an execution issued thereon, had the real estate sold, and became himself the purchaser. A then sued to foreclose his mortgage, making proper parties, and, pending such suit, the auditor sold the real estate, on the school fund mortgage, and B became the purchaser. B answered to A's suit, setting up his title from the auditor. A replied that at the time of the mortgage-sale, by the auditor, it was agreed between him and B, that he would suffer the real estate to be sold, and would not bid thereon, but would permit B to purchase the same, and that B would pay the amount of A's mortgage, if the auditor's sale was held valid in the suit then pending.

Held, that said reply was not demurrable, and that B should not be permitted to deprive A of his priority of lien by asserting a legal title thus obtained. 16 Ind. 178. 17 *Id.* 230.—*Rupert v. Morton et al.* 313

NEW COUNTY.

1. This Court will take judicial notice of a county created by a public statute, but not of one created by county commissioners under the general law.—*Buckingham v. Gregg*, 401
2. The time of the erection of a new county by the commissioners, where it becomes material on a question of jurisdiction, must be proved. *Ibid.*
3. The Court will judicially notice the time of the sessions of courts held in such new county, pursuant to law. *Ibid.*
4. A suit, commenced to foreclose a mortgage, in the proper county, would not be defeated by the division of the county afterward. *Ibid.*
5. The division of a county would not be complete until a court was so far organized therein as to enable suits to be commenced in such new county. *Ibid.*

NEW TRIAL.

1. In an action to vest and quiet title to real estate in the plaintiff, if judgment goes against him below, he is entitled, on payment of the costs, to a new trial, as a matter of right, under the statute.—*Shucraft v. Davidson*, 98

NON COMPOTES MENTIS.

See CONTRACTS, 1, 2.

OCCUPYING CLAIMANTS.

1. The third sub-section of section 617, under the occupying claimant's law, does not limit the recovery to the value of the rents and profits which had accrued before the rendition of the judgment in the original or ejectment suit.—*Adkins v. Hudson*, 392
2. In actions under said law, where the court finds that, without the improvements, no rents and profits would have accrued to the time of rendering judgment, it is error to charge the occupant with such rents and profits as have accrued by reason of his improvements alone. *Ibid.*

OFFICES.

*See COLONEL OF VOLUNTEERS, 1.**See REPORTER OF THE SUPREME COURT, 1.**See VACATION OF OFFICES, 1.*

1. Where it appears, *prima facie*, that acts or events have occurred subjecting an office to a judicial declaration of being vacant, the authority authorized to fill such vacancy, supposing the office to be vacant, may proceed, before procuring a judicial declaration of the vacancy, and appoint or elect, according to the forms of law, a person to fill such office.—*The State ex rel., etc. v. Jones*, 356
2. But if, when such person attempts to take possession of the office, he is resisted by the previous incumbent, he will be compelled to try the right, and oust such incumbent, or fail to oust him, in some mode prescribed by law. *Ibid.*
3. If such elected or appointed person finds the office, in fact, vacant, and can take possession, uncontested by the former incumbent, he may do so, and so long as he remains in such possession, he will be an officer *de facto*; and should the former incumbent never appear to contest his right, he will be regarded as having been an officer *de facto* and *de jure*. *Ibid.*
4. But should such former incumbent appear, after possession has been taken against him, the burden of proceeding to oust the then actual incumbent will fall upon him; and if in such proceeding it is made to appear that facts had occurred before the appointment or election justifying a judicial declaration of a vacancy, it will be then declared to have existed, and the election or appointment will be held to have been valid. *Ibid.*

OFFICERS.

De Facto and *De Jure*. See OFFICES, 1, 2, 3, 4.

OVERRULED CASES.

1. The cases of *Harriman v. Southam*, 16 Ind. 190, and *The Evansville, etc., Railroad Company v. The City of Evansville*, 15 Ind. 395, so far as the rulings therein are inconsistent with the decisions in *Snyder v. Studebaker, infra*, p. 462, are overruled.—*Snyder v. Studebaker*. 462

PARTIES.

See PLEADING, 12.

1. In actions upon the official bonds of township trustees, for failing to pay over to their successors in office the money of the township in their hands, the State, on the relation of the person who is trustee at the time suit is begun, is the proper party plaintiff.—*Dishon v. The State ex rel., etc.* 255

2. Where an action relates to the separate property of the wife, she may sue therefor, without joining her husband as a plaintiff in the action.—*Adams v. Sater*, 418

PARTNERSHIP.

See PLEADING, 5.

1. After the formation of a partnership between two persons, a third person agreed, verbally, with one of the partners, to pay him one-half of the amount paid in by him, and one-half of one-third of the loss that might occur, and to receive from him one-half of one-third of the profits of said partnership, which verbal agreement was long afterward reduced to writing.
Held, that said agreement did not constitute such third person a member of said firm, or render him liable for the debts of the firm, it not appearing that he was held out as a partner.—*Reynolds v. Hicks*, 113

"PERSON OF UNSOUND MIND."

See CONTRACT, 2, 3.

1. A person, alleging unsoundness of mind at a particular time, must establish, by the preponderance of evidence, that he was not of sound mind at the given time; but when it appears that a person was, at a given time, of unsound mind, unless the unsoundness was occasioned by some temporary or transient cause, the legal

presumption arises, that that state of mind continues, until the contrary is made to appear, by evidence; but if, notwithstanding such unsoundness, the person had sufficient disposing memory, as if the unsoundness consisted of monomania, not impairing his capacity to acquire or dispose of property, then it devolved upon the party interested to sustain his acts in the particular case, to show that fact by evidence.—*Crouse v. Holman*, 30

PHYSICIANS.

See EVIDENCE, 3.

PLEADING.

See CONTRACTS, 11. VENDORS AND PURCHASERS, 10.

1. A paragraph which assumes to answer more than the matter pleaded will bar, is bad on demurrer.—*Johnson v. Seymour*, 24
2. In an action upon a note payable in "wagon-work," it is not necessary to aver that the plaintiff had designated the kind of wagon-work to be received. *Ibid.*
3. At common law, fraud could be given in evidence under the general issue; but under the code, fraud must be specially pleaded, by averring the existence of all the elements necessary to be proved to make a fraud.—*Jenkins v. Long*, 28
4. If the alleged fraud consist in false representations, such representations must go to a material fact, and be made under such circumstances that the party has a right to rely upon them, and it must appear that he did rely upon them. *Ibid.*
5. A complaint on a note, averring that it was made and delivered to the plaintiff by the defendants, who were partners, by their agent, who signed the same, A. B., "Agt.," and that it remains unpaid, would not be a good complaint at law; but in equity, as a general rule, wherever an agent has contracted within the sphere of his agency, and the principal is not, by the form of the contract, bound at law, the Court will enforce it against the principal, upon principles *ex aequo et bono*.—*Kenyon v. Williams*, 44
6. A complaint based upon a contract which is required, by the statute of frauds, to be in writing, should contain the original contract, or a copy of it, or an excuse for not containing either.—*Estep v. Burke*, 87
7. Where money, lent to be wagered upon the result of an election, is the consideration of a note given for its repayment, and the maker is sued upon the note, and relies upon the illegality of the transaction to defeat a recovery, he must aver, in his answer, that

the money was "lent at the time of such wager."—*Ensley v. Patterson*, 93

8. In an action upon a recognizance taken and approved by a sheriff, the facts which authorized him to take the recognizance should be averred in the complaint.—*Meyers v. The State*, 127

9. Suit on a written instrument, in these words: "David Macey and James Turner against The City of Indianapolis and Daniel Titcombe. We undertake that the plaintiffs, David Macey and James Turner, shall pay to the defendants, The City of Indianapolis and Daniel Titcombe, all damages and costs which may accrue by reason of the injunction in this action. This 30th day of October, 1859. David Macey, James Turner, J. W. Patterson, Wm. Wilkison. Approved by me, this 31st day of October, 1859. John Coburn, Judge Court Com. Pleas, M. C." Held, that in order to make it appear that the injunction was not rightfully obtained, and that Titcombe sustained legal damages from its issue, the complaint should show, affirmatively, that a legal contract for the improvement of the street was entered into by the city with Titcombe; but the complaint need not aver that the city had power to improve the streets, as the Court takes judicial notice of the existence of such power.—*Macey v. Titcombe*, 135

10. In an action for work and labor done, and materials furnished, in the erection of a building, under a written contract, in which it is expressly agreed that no allowance shall be made for *extra* work, in order to entitle the plaintiff to recover for extra work, the pleadings should show that the extra work claimed for was expressly authorized by the owner of the building, or that it was so distinct from the building contracted for, that the owner might have accepted and used the building without accepting and using the extra work, and that such owner yet did accept and use such extra work.—*Duncan et al. v. The Board, etc. of Miami Co.*, 154

11. Action on a note against A, B, and C. Complaint in two paragraphs: 1. That, on the 1st of December, 1858, the defendants, by their note, promised one H. E. Cowgill to pay him two hundred and twenty-five dollars, six months after date, and that he indorsed the note to the plaintiff, which is unpaid. 2. That, on December 1, 1858, A and B, two of the defendants, made a certain other note to Cowgill, whereby they promised to pay him the further sum of two hundred and twenty-five dollars, six months after date, and that, before the delivery of the note to Cowgill, and to induce him to accept the same, C, the other defendant, indorsed the note as an original promisor, whereby the defendants became liable, and promised to pay Cowgill said sum, etc., and that Cowgill indorsed the note to the plaintiff, and that it remains unpaid, etc. The note and indorsements read as follows:

“\$225. GREENCASTLE, IND., December 1, 1868.
 “Six months after date, we promise to pay *H. E. Cowgill*, or
 order, two hundred and twenty-five dollars, value received.
 Indorsed: “C.” “A. B.”
 Indorsed further: “I guarantee the payment of one hundred and
 eighty-nine dollars and eighteen cents, when this note becomes due,
 to *Ed. G. Bladen*, and I assign the same to him. *H. E. Cowgill*.”
Held, that the complaint states a good cause of action against the
 defendants.—*Bondurant v. Bladen*, 160

12. *Held*, also, that there is no defect of parties defendant, because
Cowgill's indorsement guarantees the payment of a part of the
 note, and assigns it all. *Ibid.*

13. *Held*, also, that although the first count, as applied to the note in
 suit, may be defective, yet a demurrer to the whole complaint must
 be overruled, as the second count is unobjectionable.
Answers: 1. General denial. 2. Fraud. 3. Want of consideration.
 4. By C, one of the defendants, that he signed the note as a guar-
 antor, and not as a maker, and that there was no consideration
 for his guaranty and indorsement. Fourth paragraph stricken out,
 on plaintiff's motion. Exception. *Ibid.*

14. *Held*, that, as the complaint averred that C executed the note as
 a maker, he could make the same proof under the general denial
 that he could under the fourth paragraph, and it was, therefore,
 properly stricken out. *Ibid.*

15. *Held*, also, that it may be legally inferred, from the pleadings,
 that the guaranty and the note were executed at the same time,
 and upon the same consideration, and, therefore, that C could make
 the same defense under the third paragraph of the answer as un-
 der the fourth. *Ibid.*

16. *Held*, also, that the fact that the purpose for which the note in
 question was executed, and to which it was applied, operated as a
 benefit to A, one of the makers, was a sufficient consideration for
 its execution. *Ibid.*

17. If a person desires to avoid a subscription to the capital stock of
 a railroad company, on the ground of fraudulent representations
 made by the soliciting agent of the company, to induce him to
 subscribe, and he suffers an unreasonable period of time to elapse
 before he asserts his right to such relief, [seven years in this case,]
 he should show a sufficient excuse for his failure to act at an ear-
 lier date, or the legal presumption will be against his right to set
 up said defense at all.—*Dynes v. Shaffer*, 105

18. In a complaint, the amount demanded in the prayer is the crite-
 rion of jurisdiction, and the same rule applies to a defense by way
 of set-off.—*Pate v. Shafer*, 173

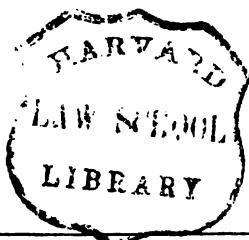
19. If a corporation had once a legal existence, which is alleged to have been determined, it is necessary that the pleading should show and set forth particularly the manner in which its corporate powers ceased.—*Sutherland v. The Lagro and Manchester Plank Road Company*, 192
20. If a complaint fail to state facts sufficient to entitle the plaintiff to the relief prayed for, he will not be entitled to an injunction, or temporary restraining order, and the dissolution of either will not be error. *Ibid.*
21. Where the holder of a note, which is past due, for a new and valuable consideration received by him, agrees to forbear to bring suit upon the note, for a reasonable time thereafter, and violates such agreement, such breach can not be made available by way of counterclaim.—*Newkirk v. Neild*, 194
22. A plea to the jurisdiction should be verified, and, if not verified, should be disregarded; and, if such plea having been disregarded in a cause pending before a justice of the peace, the defendant plead to the merits, he waives all questions of jurisdiction over his person, and such questions can not be raised on appeal to the Common Pleas or Circuit Court, by amendment or otherwise.—*Storm v. Worland*, 203
23. In an action by the payee, in his own name, upon a note made payable to him as trustee, etc., the words trustee, etc., will be regarded as mere description of the person, and an answer denying his title to, or right to recover upon, said note, should show that he has ceased to be such trustee, etc.—*Robbins v. Dishon*, 204
24. An answer to a complaint on a note, setting up an alleged former recovery for the amount of said note, in another action, should be accompanied by a copy of the proceedings and judgment in said action. *Ibid.*
25. Where a complaint is filed in the usual form, on a note and account, and a copy of the note and a bill of particulars of the account are filed with the complaint, and also an affidavit, in attachment, entitled of the cause, and in the form prescribed by the statute, properly verified, is filed, and thereupon a writ of attachment is issued, it is error to quash the attachment for insufficiency of the affidavit.—*Sweeny et al. v. Cochran*, 206
26. Where an answer consists of several paragraphs, and a single demurrer is filed thereto, in which the plaintiff says "he demurs to *each* paragraph of the answer," etc., the demurrer must be taken distributively, and is equivalent to a separate demurrer to each paragraph, and may, therefore, be overruled as to part, and sustained as to part of the paragraphs.—*Parker v. Thomas*, 213
27. In cases where, under the general traverse, a corporation-plaintiff

is not bound to prove her incorporation, *nul tiel corporation* is a good defense; but where the corporation is bound to allege, and, if denied, to prove, that the requisite steps, under the statute, have been taken, to constitute a valid corporation, *nul tiel corporation* amounts merely to the general denial, and, the latter being also pleaded, the former may be stricken out on motion.—*West v. The Crawfordsville, etc. Turnpike Company*, 242

28. Where the contract sued on is one made with an existing corporation, the general traverse would be an admission of the existence of the corporation; but where the contract is made with a view to the organization of a corporate body, the defendant will not be liable, unless the corporation proves, at least, a substantial compliance with all the requirements of the law necessary to constitute such a body. *Ibid.*

29. Where, to an action on a subscription to the capital stock of a corporation, made while the corporation was in progress of organization, the subscriber pleads in bar, that he was illiterate; could not read; did not hear the articles of association read; but was induced to subscribe by a party interested in obtaining the subscription, who falsely represented to him, that, in case he subscribed, he would not, according to the conditions of said articles, be required to pay for his stock, until the amount of twenty thousand dollars was subscribed; and that said sum never was subscribed; such facts constitute a good defense to the action. *Ibid.*

30. Suit on a promissory note. The complaint averred, in the first paragraph, that the note was made by A, payable to B, at the *Ocean Bank*, and B indorsed it to C, who indorsed it to D, who indorsed it to said bank; and, at maturity, it was duly presented at the place, etc., and payment demanded and refused, of which the defendants had notice, and that the law of *New York* provides, that "all notes in writing, made and signed by any person, whereby he shall promise to pay to any other person, or his order, or to the order of any other person, or unto the bearer, any sum of money therein mentioned, shall be due and payable as therein expressed, and shall have the same effect, and be negotiable in like manner, as inland bills of exchange, according to the custom of merchants. The second paragraph averred that the note was made by A, payable to B, at the same place, and that B, C, and D, then indorsed it, and delivered it to A, to be by him negotiated at said bank, at, etc., and that A on, etc., at said bank, etc., did negotiate, sell, and deliver the same to said bank, and also averred presentation, non-payment, notice, etc. The defendants, in their second defense, averred, that said notes are one and the same, and that the defendants were all residents of *Laporte* county, *Indiana*, and the note was made and indorsed there, and that, "by said indorsement, the defendants meant and intended to become bound only



as indorsers, and not as makers of said note;" and when it became due, A had property sufficient, and was able to pay the same, but the plaintiff "took no steps to collect the same from him, until December 9, 1859, and they have not yet exhausted their remedy against him." The third defense was usury. Demurrs to the second and third paragraphs of the answer were sustained.

31. Held, that the second paragraph of the answer presents a good defense to the first paragraph of the complaint.—*Walker et al. v. The Ocean Bank,* 247

31. Held, also, that both paragraphs of the complaint were subject to demurrer, and that, therefore, the demurrer to the answer would reach back to, and embrace them, and should have been sustained. *Ibid.*

32. Where the judgment of a court is the foundation of an action, or defense, the record of such judgment, or a transcript thereof, must be made a part of the complaint.—*Brady v. Murphy,* 258

33. There is no implied denial to an answer, under the code, as there is to a reply, and a general denial filed to an answer, consisting of several paragraphs, can not be considered as a denial of a new and substantive defense afterward filed by way of additional paragraph.—*Swihart v. Cline,* 264

34. A paragraph of an answer, which sets up in bar of an action upon an agreement, a new agreement between the parties, which does not appear to have been executed, and was a mere accord without satisfaction, is bad on demurrer.—*Coquillard's Adm'r v. French,* 274

35. A paragraph of an answer which pleads no facts that can not be given in evidence under the general denial, the latter having been pleaded, should be stricken from the files on motion. *Ibid.*

36. In a complaint for foreclosure, by the mortgagee against the mortgagor alone, it is not necessary to aver that the mortgagor has not sold the land, or that the mortgage has been acknowledged or recorded.—*Perdue v. Aldridge,* 290

37. Where a debt is paid in paper, in the similitude of bank bills, which is unauthorized and void, but is at the time current, and the person to whom the same was paid brings his suit to recover upon the original demand, the defendant may plead in bar of his action, that the plaintiff, to whom such paper was paid, passed the same, at par, to other persons, who returned the same to the defendant, and that the defendant redeemed the same, so that the plaintiff suffered no injury by reason of the reception thereof.—*Alexander v. Byers,* 301

38. And a reply to such defense, admitting the delivery of such paper, and averring that the bank, issuing the same, was not organized,

etc., but was in violation of the laws and constitution of the State; and that the notes, etc., were issued in violation, etc., but were in the form and similitude of bank notes, and were intended to be used, etc., as bank notes, but had no legal value, and were unconstitutional—void; and, that, therefore, the payment in the same was not valid, etc., is bad on demurrer, because it fails to take direct issue on the facts averred in such defense, or to set up other facts sufficiently responsive thereto. *Ibid.*

39. Real estate is first mortgaged to secure school funds, and then to A to secure a debt, and then B recovered a judgment against the mortgagor, and, on the execution issued thereon, had the real estate sold, and became himself the purchaser. A then sued to foreclose his mortgage, making proper parties, and, pending such suit, the auditor sold the real estate, on the school fund mortgage, and B became the purchaser. B answered to A's suit, setting up his title from the auditor. A replied, that at the time of the mortgage-sale, by the auditor, it was agreed between him and B that he would suffer the real estate to be sold, and would not bid thereon, but would permit B to purchase the same, and that B would pay the amount of A's mortgage, if the auditor's sale was held valid in the suit then pending.
Held, that said reply was not demurrable, and that B should not be permitted to deprive A of his priority of lien by asserting a legal title thus obtained. 16 Ind. 178. 17 *Id.* 230.—*Rupert v. Morton et al.*, 313

40. An answer to an action upon a note, in these words: "The defendant says that the note, in the complaint mentioned, was obtained from him by fraud, covin, misrepresentations, and deceit of the said plaintiff, and without any good or valid consideration, and this," etc., is neither sufficient as a general answer of want of consideration, for it seems to admit that there was some consideration for the note, but fails to set out the facts which render it invalid, nor as a general answer of fraud, because it is too uncertain.—*Honeywell v. Helm*, 321

41. In an action for possession of, and to quiet title to, real estate, the plaintiff's deed is mere evidence of his title, and it is not, in such sense, the foundation of his action, as to require it to be set out in his complaint, by copy or otherwise.—*Lash v. Perry*, 322

42. As to the sufficiency of pleadings in certain cases, see *Wheeler v. Ruston et al.*, 334

43. Action on two notes by R against A and B. The defendants answer, that C and D were partners, and dissolved, when C, with A and B as his sureties, executed two notes to D, for his interest in the partnership property, and he assigned them to R, and then A and B took them up, and gave in lieu thereof the notes in suit,

being for the same amount; and that, before the dissolution of the partnership, the said A and B were sureties for C and D, for the payment of one thousand dollars, which they had been, since the execution of the notes in suit, compelled to pay, and that C and D are both insolvent, and have no property subject to execution, and that D assigned the original notes to R without consideration, and with intent to defraud his creditors, of which intent the said A and B had no notice, when they executed the notes in suit as aforesaid, and that D is now the real owner of the notes in suit, and they pray that D be made a party, and that enough of the amount paid by them, for D as aforesaid, to pay the notes in suit, be set off against them, etc.

Held, that said answer constituted no defense, or bar to the plaintiff's action, and that the claim of set-off could not be sustained, because the defendants did not become the creditors of D until after they had notice of the assignment to the plaintiff, and had executed to the plaintiff the notes in suit.—*Adams et al. v. Rodarmel*, 339

44. Suit for overflowing land. The defendant answered, setting up an unsealed and unacknowledged, but signed and recorded, contract in writing, made between the plaintiff's grantor and others, and the defendants, as follows: "Whereas, A, B, and C, contemplate erecting a dam across the *Tippecanoe river*, about six miles below *Winnemac*, near B's, on, etc., in section 9, etc., and contemplate the erection of mills below said dam, to the hight of six feet; and whereas, we, the occupants and owners of lands adjoining and contiguous to said proposed dam, and to the river above said dam, likely to be affected by back-water from said project, and erection of such proposed mills, of public utility; therefore, to encourage the said A, B, and C, in such undertaking, we do hereby assent and agree, that said men, or any of them, or their substitutes, or assigns, or heirs, may erect such dam, to the hight aforesaid, and for ourselves, and heirs, and assigns, do waive and release all damages that may ensue from the erection of such dam, and from back-water caused by the dam;" and further averred, that, under it, the dam and mills, costing thirteen thousand dollars, were erected; that one thousand dollars had been expended on the dam at the time the plaintiff purchased the land; that he had notice, and stood by and saw said expenditures, and paid one thousand five hundred dollars, etc., of said purchase money, after said work was completed, etc.

Held, that said answer set up a good bar to the action.—*Stephens et al. v. Benson*, 367

45. Where an allowance made by a Court of Common Pleas, against an estate, is the foundation of an action, a transcript thereof should be filed with the complaint.—*Bates' Administrator v. Simpson et al.*, 388

46. An answer, setting up a former recovery, should contain a transcript of the record of the former cause.—*Adkins v. Hudson*, 392

47. Action on a note given for a patent-right. Answer, that the payee of the note represented himself as the owner of the patent, etc., and that, in fact, he was not the owner, and had no title.
Held, that the answer was good.—*Thompson v. Oskamp*, 399

48. An answer is not regarded as double, where one of two grounds of defense is not well pleaded.
Ibid.

49. Where a note, executed and payable in another State, bears a higher rate of interest than is allowed in this State, and suit is instituted upon it in this State, it is not necessary to plead the law of the foreign State.—*Buckingham et al v. Gregg*, 401

50. A defense assuming to answer the whole, but only answering a part of a cause of action, is bad on demurrer.—*Free v. Haworth*, 404

51. A complaint by a ditching company, organized under the general law of the State, for the collection of assessments made by the corporation in the progress of the drainage of the land of the defendant and others, should contain a copy of, or the original, assessment; because the assessment is in the nature of a mortgage, and should be made the foundation of the suit to enforce the lien; and the complaint should also describe the ditch to be constructed, by giving its direction and termini; and, perhaps, the outlet for the water which may empty into it.—*West v. The Bullskin Prairie Ditching Company*, 458

PRACTICE.

See LICENSE, 1. INTERROGATORIES, 1, 2. JUDGMENT, 3. USURY, 2.

See PRACTICE IN THE SUPREME COURT, 2. RAILROADS, 4. CITIES, 1.

PLEADING, 13. PROCEEDINGS SUPPLEMENTARY TO EXECUTION, 1, 2, 3.

1. Uncertainty may be the ground of a motion to compel a party to make his pleading more certain, but not a ground of demurrer, unless the pleading be so uncertain as not to state intelligibly a substantially good cause of action or defense.—*Snowden v. Wilas*, 10

2. The objections that there is a want of jurisdiction, and of a cause of action, may be raised upon appeal.—*The President and Directors of, etc. v. Smith*, 42

3. Matter in abatement can not be answered either after or concurrently with matter in bar, but must precede it, or it will be considered to have been waived.—*Kenyon v. Williams*, 44

4. A demurrer to a complaint on an administrator's bond, assigning several breaches, one of which is well assigned, should be overruled.—*Whitehall v. The State ex rel., etc.*, 27

5. The defendants can not complain of a special finding by a jury,

of damages on such breaches as are good, and a failure to find damages on those which are not well assigned. *Ibid.*

6. Where a judgment is rendered after a default, a motion to set aside the default should proceede an appeal to this court.—*Lawshe v. McClain*, 67

7. It is the imperative duty of the Court, at the request of either party, to direct the jury to find a special verdict.—*Noble v. Enos*, 72

8. But, if such request is made, the party can not at the same time require that interrogatories shall be propounded to, and answered by, the jury, in the event of a general verdict being returned: and if he make the latter request, the demand for a special verdict will be thereby waived. *Ibid.*

9. Where an action is tried before a justice of the peace, and judgment rendered, and appeal taken to the Circuit Court, and in the latter, without leave, the plaintiff inserts a material amendment in his complaint, such amendment can constitute no part of the complaint, and the Court should, on proper application, instruct the jury to allow nothing under it.—*Best v. Powers*, 85

10. A joint demurrer, by three parties, to a complaint which is good as to some of them, is bad as to all, and should be overruled, because a pleading, bad as to a part, is bad as to all the parties to it.—*Estep v. Burke*, 87

11. Where a reply consists of two paragraphs, of which one is the general denial, and a demurrer is filed to the reply generally, it is error to sustain it, because such a demurrer is addressed to the entire reply.—*Adkins v. Wiseman*, 90

12. Where several defendants demur jointly to a complaint, which states a good cause of action, as against some of them, and not as against others, the demurrer should not be sustained.—*Teter v. Hinders*, 93

13. It is error for the judge to receive a verdict out of court, and discharge the jury, without the consent of the parties.—*Tuke v. Eber*, 126

14. When several defendants jointly demur to a complaint, for defect of parties defendant, if there is one defendant who is unobjectionable as a party, the demurrer should be overruled.—*Everhart v. Hollingsworth*, 138

15. A bill of exceptions, not filed during the term of the court below, nor thereafter with special leave of the court, can not be considered a part of the record. *Ibid.*

16. The judge of the lower court can not, out of term, grant leave to perfect a bill of exceptions, or extend the time for perfecting it, at his own instance *Ibid.*

17. Where a party to an action is called as a witness for his adversary, appears, and submits to a partial examination, and then absents himself from the court-house, and disobeys legal process requiring his further attendance, such misconduct can not be considered in this court, unless it was properly brought to the attention of the court below.—*Pierce v. Cubberly*, 157
18. In a complaint, the amount demanded in the prayer is the criterion of jurisdiction, and the same rule applies to a defense by way of set-off.—*Pate v. Shafer*, 173
19. A commissioner acting under a reference to him of matters in issue in a pending suit has no right to report the evidence given before him, though he may report the facts proved by it, if authorized to do so by the parties.—*McClure v. McClure*, 185
20. The failure to demur to the complaint, or move in arrest, as a general rule, is a waiver of objections thereto. *Ibid.*
21. Where judgments are taken by default, a motion to set aside the default, or for a review, should precede an appeal to this court.—*Willhelm v. Bull*, 227
22. On the calling of a cause, the defendant filed a general denial, putting the case at issue, but then had leave of the court to file additional paragraphs of his answer, on or before the next calling of the cause, and, on such calling, no additional paragraphs were filed, but on the next day of the term, the defendant asked leave to file such paragraphs, which was refused.
Held, that such refusal was not an abuse of the discretionary power of the court.—*Tinkler v. Palin*, 240
23. A party to an action, who has complied with an order to answer interrogatories, may also be compelled to appear and testify as a witness, at the instance of the party propounding the interrogatories.—*Smith v. Roseham*, 256
24. The defense of *former recovery* can not be given in evidence, under the general issue.—*Brady v. Murphy*, 258
25. Where a cause, by agreement, is referred to a commissioner to take accounts, without an answer having been filed to the complaint, the consent cures the error.—*The State ex rel., etc. v. Carrington et al.*, 258
26. Where, in an application for a change or location of a public highway, before the board of commissioners of the county, the final order of the board directing the change is defective for uncertainty, such defect may be remedied by a motion for that purpose, but it is not a ground for a dismissal of such application.—*Daggy et al. v. Coats et al.*, 259
27. There is no implied denial to an answer, under the code, as there

is to a reply; and a general denial filed to an answer, consisting of several paragraphs, can not be considered as a denial of a new and substantive defense afterward filed by way of additional paragraph.—*Swihart v. Cline*, 264

28. The summons is a part of the record, where there is no appearance.—*Stanton v. Woodcock*, 273

29. In rendering judgment on money demands, it is proper to render the judgment for the aggregate amount of the principal and interest due at the date of the judgment, and the same will bear interest from date. *Ibid.*

30. Variances between instruments sued on, and those offered in evidence, where the defendant will not be prejudiced thereby, may be amended on the trial.—*Perdue v. Aldridge*, 290

31. After an action has been dismissed by the plaintiff, and then reinstated upon the docket, the voluntary appearance of the parties to the action, and submission of it for trial to the court, amount to a waiver of the dismissal.—*Mahon v. Mahon's Administrator*, 324

32. Newly-discovered evidence is not a ground for a review, under the code; nor is error in form only, although apparent on the face of the decree; nor is mere matter of abatement.—*Fleming v. Stout*, 328

33. On an appeal from a judgment of an inferior court, for the refusal to grant a new trial on the ground of newly-discovered evidence, the record should contain the evidence given on the trial below, in order that this court may be able to determine whether the newly-discovered evidence, if admitted on another trial, would produce a different result; otherwise, this court will not reverse the judgment below.—*Crawford et al. v. Martin*, 370

34. Whatever of the proceedings of a court should be brought before the Appellate Court, by bills of exceptions, can not be incorporated into the record of the cause, by the mere entries of the clerk; and if they are so incorporated, they will not be available as parts of the record, on appeal. It is the business of the clerks to enter the orders of the court, and not to make a record of the reasons for such orders.—*Wilson v. Truelock*, 389

35. It is error for the Court, after a jury has heard the evidence, and been charged by the Court, and retired to consider of their verdict, to send its written instructions to the jury at their room, without consent of both parties.—*Smith v. McMillen*, 391

36. The jury should receive the charge, and all subsequent instructions and explanations touching their duties, in open court, in the presence of the parties. *Ibid.*

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36. The jury should receive the charge, and all subsequent instructions and explanations touching their duties, in open court, in the presence of the parties. *Ibid.*

37. Proceedings on a motion for a continuance are no part of the record, unless made so by a bill of exceptions.—*Free v. Haworth*, 404

38. A voluntary appearance, in full, to a cause of action, waives all defects in process or publication. *Ibid.*

39. In cases where there is a conflict of testimony, and the evidence of the winning party, taken by itself, will support the judgment rendered, it must be affirmed.—*Rogers v. Lewis*, 405

40. If the defendants have been notified legally of the pendency of the action, the written authority of their attorney need not be produced to enable him to act; but, if they have not been so notified, and judgment is rendered against them on the agreement of their attorney, they should apply to the court below for relief from the judgment, and if denied them, on a proper case made, this court may be asked to determine the rights of the parties.—*Dougherty et al. v. Andrews*, 406

41. It is not error to refuse a continuance asked for because the causes of action were not filed with the complaint, either by copies or the originals, where it appears that such causes of action were, a reasonable time before the trial, handed to the defendant's attorneys by the plaintiff's attorneys.—*The Board, etc. of Floyd County v. Day*, 450

PRACTICE IN THE SUPREME COURT.

See PRACTICE, 17, 34.

1. The objection that there is a want of jurisdiction, and of a cause of action, may be raised upon appeal.—*The President and Directors of, etc. v. Smith*, 42
2. Where a new trial is asked, on account of alleged misconduct of the jury, which is presented to the court below in the form of affidavits, and the new trial is denied, and the refusal is assigned for error in this court, such affidavits will not be considered as constituting a part of the record of the cause, unless made so by a bill of exceptions.—*Matlock v. Todd*, 130
3. As to what matters will be considered as properly and naturally constituting parts of the record, without a bill of exceptions, see *Matlock v. Todd*, *Ibid.*
4. This court will not reverse a judgment for error in sustaining or overruling a demurrer for misjoinder of causes of action.—*Everhart v. Hollingsworth*, 138
5. Where time is given beyond the term to file a bill of exceptions, the record should show that the bill was filed within the prescribed time.—*Maffett v. Pollard*, 178

6. The record, in a criminal prosecution upon indictment, should show that the indictment was returned into court by the grand jury, and identify it, by some entry from the record of the lower court describing it by the time of its filing, and its number, or otherwise.—*Springer v. The State*, 180
7. The failure of the complaint to state facts sufficient to constitute a cause of action, may be urged as a ground of reversal in the Supreme Court, although the objection was not made below.—*McCleure v. McClure*, 185
8. Unless there has been a verdict, or finding in the nature of a verdict, in which case all defects in the complaint will be cured thereby, if, from the issues in the case, the facts omitted, or defectively stated, may fairly be presumed to have been proved on the trial. *Ibid.*
9. The record on appeal to this court must show that the bill of exceptions was filed within the term, or the time prescribed by the court for its filing after the term, or it will not be considered as constituting any proper part of the record before this court.—*Cable v. Smoyer*, 202
10. Where a motion, based upon an affidavit, is made to set aside a default, and it is overruled, and the party excepts, and desires to have the error, if any, reviewed in this court, he should make such affidavit a part of the record by his bill of exceptions.—*Hays v. Marks*, 225
11. This Court does not judicially know that wine is not intoxicating, and will not question the right of the legislature to declare it to be intoxicating.—*Jackson v. The State*, 312
12. Where bills of exceptions are filed after the time allowed by the court for filing the same, but no motion is made in this court to strike out said bills, and no cross-errors are assigned touching the same, and the briefs of counsel are silent on the subject, this court will consider such objections waived.—*The New Albany, etc. Railroad Co. v. Huff*, 315
13. A question, addressed to a witness, which merely calls for an opinion, instead of a statement of facts, upon which a verdict should be based, should be suppressed; but, if the answer to such question was such as could do no harm to the adverse party, this court will not reverse the judgment by reason of the refusal to suppress the question.—*The New Albany, etc. Railroad Co. v. Huff et al.*, 315
14. Where an action is begun in the name of an administrator, and before its determination he dies, and the name of an administrator, *de bonis non*, is substituted as plaintiff, objections to the manner of the appointment of the latter can not be noticed in this court,

unless they were properly brought to the attention of the court below.—*Mahon v. Mahon's Administrator*, 324

15. Where a court gives time to file a bill of exceptions, and the same is not filed within the time given, it will not be considered as forming any part of the record in this court. *Ibid.*

16. Where an appeal is taken to this court, and the record sent here is defective, it is the duty of the parties, by their counsel, to cause the same to be made correct, by a writ of *certiorari*; but, if this duty is neglected, and the cause is submitted here for decision, upon such defective record, the decision will be as operative and binding against all the parties to it, as if it had been rendered upon a perfect record.—*Gregory et al. v. Slaughter et al.*, 342

17. On an appeal, from a judgment of an inferior court, for a refusal to grant a new trial on the ground of newly-discovered evidence, the record should contain the evidence given on the trial below, in order that this court may be able to determine whether the newly-discovered evidence, if admitted on another trial, would produce a different result; otherwise, this court will not reverse the judgment below.—*Crawford et al. v. Martin*, 370

18. This court will not disturb the judgment of a court below, where it is not manifestly wrong, and the evidence tends to sustain it.—*Eaton et al. v. Acton et al.*, 371

19. When time is given for the filing of a bill of exceptions, the record should affirmatively show that the bill was filed within the time limited, or it will not be considered as forming any part of the record before this court.—*Hornaday et al. v. Cooper*, 383

20. In an action to foreclose a mortgage, where some of the proceedings may be irregular, but the result of the action is such that no party is injured, or has any cause to complain, this court will not very closely examine the alleged irregularities.—*Louden v. Dicker-
son*, 387

21. This court will not notice a bill of exceptions which was filed two years after the expiration of the time limited for its filing, although filed with the consent of the court below, if filed without the consent of the opposite party, and probably not, if filed with such consent.—*Cox v. Blair et al.*, 390

22. This court will not presume that a note was made beyond its jurisdiction.—*Farnhi v. Ramsee*, 400

23. This court will take judicial notice of a county created by a public statute, but not of one created by county commissioners under the general law.—*Buckingham et al. v. Gregg*, 401

24. The court will judicially notice the time of the sessions of courts, held in such new county, pursuant to law. *Ibid.*

POWER OF ATTORNEY.

1. An authority "to attend to the business of the principal generally," or "to act for him with reference to all his business," does not authorize the agent to sell real estate, nor does it allow him to sell, or otherwise dispose of the personality of his principal, unless as a means, necessary and proper, to conduct the business to which the agency applies.—*Coquillard's Adm'r v. French*, 274
2. Before a judgment can be rendered against a person, on the agreement of his attorney, where the person does not personally appear, and has not been personally summoned, the attorney must produce and prove written authority from his client to consent to such judgment.—*Jarrett v. Andrews*, 403
3. If the defendants have been notified legally of the pendency of the action, the written authority of their attorney need not be produced to enable him to act; but, if they have not been so notified, and judgment is rendered against them on the agreement of their attorney, they should apply to the court below for relief from the judgment, and if denied them, on a proper case made, this court may be asked to determine the rights of the parties.—*Dougherty v. Andrews*, 406

PRESUMPTIONS.

See "PERSON OF UNSOUND MIND," 4. CONTRACTS, 4.

See PRACTICE IN THE SUPREME COURT, 7, 8.

See PROMISSORY NOTES, 17.

1. This court will not presume that a note was made beyond its jurisdiction.—*Farnhi v. Ramsee*, 400

PRINCIPAL AND AGENT.

1. The fraudulent representations of an agent, made in the course of the business of his principal, bind the principal.—*Teter v. Hinders*, 93

PRINCIPAL AND SURETY.

1. Accommodation indorsers of a promissory note governed by the law merchant do not stand in the relation of sureties for the maker, for whose accommodation they became indorsers, within the meaning of our statute in relation to "Remedies of sureties against their principals."—*Gordon et al. v. The Southern Bank of Kentucky*, 192

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

1. A corporation may be required to answer, as a judgment debtor,
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in proceedings supplementary to executions.—*Tompkins and Others v. The Floyd County Agricultural and Mechanical Association and Another*, 197

2. Persons holding assets of a corporation, which is a judgment-debtor and defendant, may be compelled to answer as to such assets, in a proceeding supplementary to execution. *Ibid.*

3. In such proceedings the law fixes the first day of the ensuing term for answers to be made, but a different day may be designated. *Ibid.*

PROMISSORY NOTES.

See PLEADING, 5, 30, 31, 43.

1. The following instrument, under the act concerning promissory notes and bills of exchange, approved May 12, 1852, is not a promissory note:
 “\$1141.56. *LAFAYETTE, IND., April 16, 1856.*
 “On or before the first of April, 1858, I promise to pay *Henry C. Ash*, or order, eleven hundred and forty-one dollars and fifty-six cents, for value received, and without any relief whatever from the appraisement laws, provided, however, that, prior to the time when this note becomes due, said *Ash* shall pay and have satisfaction entered of record, of a certain mortgage given to him by *Levi Reynolds*, for two hundred and fifty dollars, dated August 26, 1851, which mortgage is on the land for which this note is given.
 “*SAMUEL SHENK.*”

Hays v. Gwin, 19

2. That act makes no instruments promissory notes but those which were such at the common law, and, therefore, the holder of the foregoing instrument can not maintain an action thereon against an indorser or assignor. *Ibid.*

3. In an action upon a note payable in “wagon-work,” it is not necessary to aver that the plaintiff had designated the kind of wagon-work to be received.—*Johnson v. Seymour*, 24

4. The terms “wagon-work,” as used in such a note, unexplained by circumstances or otherwise, evidently do not mean *labor* merely, but wagons, or, perhaps, parts of wagons, either complete or incomplete, including both the materials and the labor bestowed upon them. *Ibid.*

5. No demand is necessary before suit upon such a note, the time of payment being fixed by the note. *Ibid.*

6. If the payee, or holder of such a note, had the right of designating what particular kind of wagon-work he would require, and failed to do so before its maturity, he thereby waived his right, and the right of designation then devolved upon the maker, whose duty it

was to exercise that right, and make a tender of the property, or he would become liable to pay the amount in money. *Ibid.*

7. Where several notes are made payable at a bank, and are sold and assigned, by the payee, to the bank, and they fall due, and all the parties thereto, except the payee, in consideration of further time, execute and deliver to the bank their bill of exchange for the debt evidenced by the several notes, discharging the payee of the notes from all liability to the bank, the parties to such bill, in an action upon it, can not be allowed to inquire into the consideration of the notes.—*Estep v. Burke*, 87

8. When a note, payable at a bank, contains in its body the words "protest, and notice of protest waived," such words include a waiver of demand also, and are operative against indorsers.—*Gordon v. Montgomery*, 110

9. In an action by the indorsee against the indorser of a promissory note, not governed by the law merchant, where there has been no suit against the maker, it is sufficient, in order to entitle the plaintiff to recover, to show that the maker was totally insolvent at the earliest period of time when a judgment could have been recovered against him.—*Reynolds v. Jones*, 123

10. Accommodation indorsers of a promissory note governed by the law merchant do not stand in the relation of sureties for the maker, for whose accommodation they became indorsers, within the meaning of our statute in relation to "Remedies of sureties against their principals."—*Gordon et al. v. The Southern Bank of Kentucky*, 192

11. Where the holder of a note, which is past due, for a new and valuable consideration received by him, agrees to forbear to bring suit upon the note, for a reasonable time thereafter, and violates such agreement, such breach can not be made available by way of counterclaim.—*Newkirk v. Neild*, 194

12. A note, made payable at a place in another State, and bearing a higher rate of interest than is lawful in this State, but not a higher rate than is allowed by the law of the place where it is payable, may be enforced in this State, according to its tenor.—*Lines et al. v. Mack et al.*, 223

13. Representations, by the payer of a note, that it is all right, and will be paid, made to a purchaser of such note *after* he has become the owner thereof, shall not operate as an estoppel against the payer, nor can such representations, repeated by the purchaser thereof to any person to whom he may sell the same, have such effect in favor of such second purchaser.—*Jones v. Dorr*, 384

14. This court will not presume that a note was made beyond its jurisdiction.—*Farnhi v. Ramsee*, 400

15. But even where the note was made in a foreign country, our laws, when appealed to for its enforcement, *prima facie*, furnish the rule of decision, unless by affirmative pleading another rule is shown to be applicable. *Ibid.*

16. Where a note, executed and payable in another State, bears a higher rate of interest than is allowed in this State, and suit is instituted upon it in this State, it is not necessary to plead the law of the foreign State.—*Buckingham v. Gregg*, 401

17. In such case, the Court presumes the common law to be in force in such other State (of the *United States*), with one or two exceptions, and as that law prescribes no rate of interest, the contract will be presumed valid by the existing law, when, and where, it was made. *Ibid.*

REPORTER OF SUPREME COURT.

See LUCRATIVE OFFICE, 1, 2.

2. The office of reporter of the decisions of the Supreme Court of Indiana is a lucrative office.—*Kerr v. Jones*, 351

REPRESENTATIONS.

See ESTOPPEL, 2. *EVIDENCE*, 5.

RAILROAD.

See EVIDENCE, 2. *PLEADING*, 17, 27, 28, 29.

1. In an action against a railroad company for killing stock, commenced in the Common Pleas or Circuit Court, the complaint should aver that the killing was the result of negligence on the part of the company.—*The President and Directors of, etc. v. Smith*, 42

2. Where the rights of a corporation are derived from a public law, the fact that the agents of the corporation, in order to induce others to contract with it, or subscribe to its capital stock, made false and fraudulent representations to them as to its rights, constitutes no bar to an action on such contract or subscription.—*Parker v. Thomas*, 213

3. Where a subscription is made to the capital stock of a railroad company, upon the express condition that the road shall be located within a certain distance of a specified place, such condition will be construed to be a condition precedent: and the giving of unconditional notes for such subscription, unless so intended by the parties, does not waive the performance of the condition precedent;

and the failure of such performance may be pleaded in bar of a recovery on such notes. *Ibid.*

4. In an action against a railroad company, for damages occasioned to the plaintiffs by the erection of the road, where a general verdict was returned for the plaintiffs, the facts that the railroad company had employed competent engineers, and had done no willful or unnecessary damage, would not entitle the defendant to a judgment, *non obstante veredicto*, because the road may have been located, and the work performed, with the utmost care, and yet damage may have resulted to the plaintiffs.—*The New Albany, etc. Railroad Company v. Huff*, 315
5. Where the articles of association of a railroad company are defective, in not specifying with sufficient certainty the terminus of the road, but they are properly filed in the office of the secretary of State, such filing is notice to the State of such defect, and the State neglects, for eight years, to take advantage thereof, by *quo warranto*, or otherwise, the right thereafter to do so must be considered lost.—*The State ex rel., etc. v. Bailey et al.*, 452

RESCISSIION OF CONTRACT.

See CONTRACTS, 6, 7.

1. Before a party can be entitled to rescind a contract, he must offer to place the other party to it *in statu quo*.—*Teter v. Hinders*, 93
2. A contract can not, either for mistake or fraud, be rescinded in part, and affirmed in part, but must be rescinded *in toto*, or not at all.—*Johnson v. Houghton*, 259

REVIEW.

1. Newly-discovered evidence is not a ground for a review, under the code; nor is error in form only, although apparent on the face of the decree; nor is mere matter of abatement.—*Fleming v. Stout et al.*, 328
2. A testator directed, by his will, that his real estate should be sold by his executors, for the highest and best price for cash, or on such credit, and the amount secured in such manner, as is usual in like cases, and that the proceeds should be distributed among certain persons. He appointed two sons and a son-in-law executors. On May 20, 1851, about two thousand eight hundred acres of said lands were sold at public auction, in parcels of upward of three hundred acres, and purchased chiefly by the adult heirs, at about ten dollars per acre, and said executors purchased over eleven hundred acres thereof. In May, 1854, the executors filed their complaint against the other heirs, showing the facts, and praying

confirmation of their purchase, or that their land be reoffered for sale, and if it would not sell for any more than they were to give, and the value of their improvements on it, that then their purchase should stand and be confirmed. The court, on a trial, found the value of their improvements and ordered a resale, but no bid was received therefor, and, in July, 1854, their original purchase was confirmed. On December 20, 1859, one of the heirs sued said executors for an alleged balance due on his distributive share, and averred that the executors had used his legacy, etc., and claiming interest, etc. Demurrer sustained to the complaint in January, 1860, and amendment filed, charging that said executors, and other sons and daughters of the testator, had fraudulently combined, etc., and were each to bid in certain parcels of said land, and not to bid against each other, and to prevent others from bidding by representing that they would get into litigation, etc.; and said executors, in execution of said fraudulent purpose, offered said lands in large parcels to suit each of said heirs, and required cash down at said sale, by reason whereof said lands were purchased for much less than their value, and that when said lands were reoffered in 1854, the same frauds were repeated, and certain persons were paid for not bidding, etc.; and the plaintiff further averred, that in 1851 he was a minor, and became of age in 1854, and was never apprised of said frauds until the winter of 1859-60. Prayer, that the sale be set aside, etc.

Held, that the proceedings had in 1854, for the confirmation of said sales, were, in substance, such an adjudication as falls within the provisions of the code for the review of judgments, 2 R. S. 165, and the remedy there provided should have been pursued.—*Quick v. Goodwin et al.* 438

Held, also, that section 219, 2 R. S. 77, does not apply to cases where frauds have been committed in obtaining judgments, but rather to the matter which is the foundation of the action to obtain the judgment, and not the proceedings or judgment based thereon. *Ibid.*

Held, also, that fraud in obtaining a judgment may be shown as a cause for review, but it must be done within the time, and in the manner prescribed in the statute. *Ibid.*

SALE.

See FRAUDULENT CONVEYANCES, 1, 2. SINKING FUND COMMISSIONERS' SALE, 1.

1. Sale by one partner of his interest in the partnership stock and business. The seller represented to the purchaser that he had put into the firm one thousand two hundred and forty dollars in cash, and the firm had purchased forty thousand dollars' worth of goods, on which they supposed they had made twenty-four per

cent. profits, and he told the purchaser he could inquire of the clerks and other partners at the store; but the purchaser did not do so, believing that he could not thereby obtain satisfactory information, and concluded not to buy; but some time afterward, the seller called on him again, and told him, if he was hesitating about the amount, he need not, for it was every dollar there; and the purchaser replied, that was just what he was hesitating about, but if he said it was all there, he would trade, and the trade was then made; but it soon turned out that the seller had put in twelve hundred and forty dollars, and the firm had purchased forty thousand dollars' worth of goods, but the seller's interest in the whole concern, for some reason not explained, was worth about one thousand eight hundred dollars, instead of three thousand six hundred dollars.

Held, that, under the circumstances, the purchaser bought, reasonably relying on the representations of the seller, which, if false, would entitle the purchaser to rescind or recover damages.

Held, also, that a contract may be set aside for fraudulent misrepresentations, though the means of obtaining information were fully open to the party deceived, where, from the circumstances, he was induced to rely upon the other party's information.—*Mailock v. Todd*

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SET-OFF.

See JURISDICTION, 1. *PLEADING*, 43.

1. It is not necessary that matter of set-off shall be due at the commencement of the action in which it is pleaded, but it will be available, if it is due, when it is offered in evidence on the trial.—*Shannon v. Wilson*, 112

SHERIFF.

See SHERIFF'S SALES, 1, 4, 5, 6, 7, 8, 9, 10. *PLEADING*, 8.

1. Where a sheriff, having an execution in his hands, demands personal property of the execution-defendant, and he surrenders two notes, and afterward requests that they be given back to him, and surrenders no other property, and the sheriff then levies the execution upon and sells real estate, and on a trial to set aside such sale, it does not appear what was done with said notes, nor what was their value, this court will presume that they were returned to the defendant, and that he failed or refused to surrender other personal property, and that said sale was, in this respect, regular.—*West v. Cooper*, 1

2. It is clearly the duty of the sheriff to determine whether real estate, sold by him, is susceptible of division, so as to be sold in parcels without injury to the parties; and if he decide wrongfully,

and sell an entire tract, which might have been sold in parcels without injury, and a part of which might have been sold for sufficient to pay the debt, he may be liable on his bond for the injury *Ibid.*

SHERIFF'S SALE.

See SHERIFF, 1, 2.

1. But where the sheriff sells an entire town lot, and neither the execution-defendant, nor any other person interested in the property, suggests that it is susceptible of division, or demands that it be sold in parcels, the purchaser's title will be valid, although it may be afterward found by a jury that the property was susceptible of division.—*West v. Cooper*, 1
2. The appraisement law in force at the date of a judgment will govern sales on execution to satisfy it, when the contract upon which the judgment was rendered was executed and to be performed without the State, because our appraisement law could not, in such case, enter into and constitute a part of such contract.—*Hutchins v. Barnell's Executor*, 15
3. In an action to set aside a sale on execution, issued on such judgment, instituted before the delivery of a deed by the sheriff to the purchaser, and before the payment of the purchase money, it is competent to show by testimony where such contract was executed and payable. *Ibid.*
4. It is improper for a sheriff, in selling land on execution, to announce that he will sell only a conditional estate, that may be redeemed, in a year, because the tendency of such statement is to injure the owner of the real estate, by depreciating its value.—*Ewald v. Coleman*, 66
5. When the sheriff is about to sell land on an ordinary judgment, it is the right of the execution-defendant, and, perhaps, of the creditor, to claim that it should be sold in parcels, and to direct which parcel shall be first offered; and, if the land can be well sold in parcels, it is the duty of the sheriff thus to sell it; and the sale is voidable, but not void, if he does not.—*Patton v. Stewart*, 233
6. Where a sheriff has several executions in his hands, at the same time, on different judgments, and levies any of them upon real estate, and sells it, he should apply the proceeds of the sale to the payment of the several judgments in the order of their seniority, paying the oldest judgment first, without any reference to the fact that the levies and sale may have been made on executions issued upon junior judgments.—*The State v. Salyers*, 432
7. The purchaser, at a sheriff's sale on execution, is not bound to see that the sheriff makes a proper return to the executions, or that he makes any return. *Ibid.*

8. When a sheriff levies an execution upon real estate, and sells it for enough to pay the debt, receives the money, and makes the purchaser a deed, the judgment is extinguished, whether the sheriff make return to the execution or not, or although he make a false return. *Ibid.*
9. In such case the judgment-plaintiff must look to the sheriff and his sureties, and can not again collect the debt of the judgment-defendant. *Ibid.*
10. Any sale afterward made to pay such judgment, if made to a person having actual or constructive notice of the facts, would be an absolute nullity, and the weight of authority would seem to render any sale upon such a satisfied judgment, whether made to an innocent purchaser or not, an absolute nullity. *Ibid.*

SINKING FUND COMMISSIONERS' SALE.

1. The person making a Sinking Fund Commissioners' sale made proclamation of the terms and conditions of said sale, standing, at the time, from two to four feet from the outer door of the court-house, in *Indianapolis*, on the court-house steps, in front of the door aforesaid, and then announced to the persons attending said sale, that, while crying said sale, he would stand inside the court-house door, on account of the inclemency of the weather, and he then went into the court-house, and took a position in the judge's stand, which was just opposite the door of said court-house, and about fifty-three feet therefrom, in full view and hearing of persons at the door, and all the commissioners being present, in offering for sale, he first read the description of the land, and stated the amount due, and then inquired who would give that sum in cash for the first eighty acres in the mortgage, and receiving no bid, he then inquired who would give that sum for the second eighty acres in the mortgage, and receiving no bid, he then inquired who would give that sum for both tracts together, and receiving no bid, he then inquired who would give that sum for the whole property, on a credit of five years, and, on receiving an affirmative answer, the land was declared forfeited, and bid in for the State; and he then inquired if any one would bid the amount bid by the State, for any less quantity than the whole, on said credit, and receiving no bid, he then sold the whole to the highest bidder, on said credit.

Held, that such sale was substantially at the court-house door, and was valid.—*Patterson v. Reynolds*, 148

SPECIAL VERDICT.

See PRACTICE, 7, 8.

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SPECIFIC PERFORMANCE.

1. The Court will not specifically enforce performance of a parol contract for the purchase of land, where the land is incumbered by a prior mortgage, notwithstanding the purchaser may have made part payment of the purchase money, and he may recover back the money so paid.—*Swihart v. Cline*, 264
2. A merely voluntary executory contract, for the conveyance of land, will not be specifically enforced; nor will voluntary deed be corrected of mistakes, on the application of the grantee against the grantor; but it will be on the application of the grantor against the grantee, where, by mistake, the conveyance is for a larger estate than was intended.—*Randall v. Ghent et al.*, 271
3. An agreement, not in writing, to convey real estate, can not be enforced, unless facts exist which remove it from the operation of the Statute of Frauds.—*The Junction Railroad Co. v. Harpold et al.*, 347

STATUTES CONSTRUED.

See PROMISSORY NOTES, 1, 2. CONTRACTS, 3.

1. The word "ancestor," in section 114, p. 436, R. S. 1843, must be construed to embrace all persons from whom a title by descent could be derived, under any circumstances; that is, to be synonymous with *kindred*.—*Greenlee v. Davis*, 60
2. The interest law of 1861, so far as it relieves the promisor from the penalties, or consequences in the nature of penalties, imposed by the law of 1852, on the same subject, is not a law impairing the obligation of the terms of the contract, but rather enforcing and validating them.—*Wood v. Kennedy*, 68
3. The statutes on the subject of swamp lands, (1 G. & H. 597, *et seq.*) make full appropriation of the swamp-land fund to the payment of legitimate claims against that fund, and no further appropriation is necessary to authorize the auditor of State to draw his warrant, in a proper case, upon those funds.—*Lange, Auditor, etc. v. Stover*, 175
4. The words, "If any person shall disturb any religious society, or any member thereof, when met, or meeting together for public worship," shall be fined, etc., in section 37, of the act defining misdemeanors, etc., are void for uncertainty, so far as they attempt to create and define a crime or misdemeanor.—*Marvin v. The State*, 181
5. The act of January 27, 1853, supplemental to an act concerning liens of mechanics, etc., only applies to persons whose business it is to feed cattle, etc., and was not intended to include an isolated case of feeding, etc.—*Conklin v. Carver*, 226

6. Section 11, 2 G. & H., p. 632, does not authorize a recovery upon an appeal bond for a larger sum than the penalty named in such bond.—*King v. Brewer*, 267

7. The 11th section of the Common Pleas Act has not been so far repealed by implication, as that it may not be the subject of amendatory legislation. It has only been modified, not repealed.—*Mitchell v. The State*, 381

8. The third sub-section of section 617, under the occupying-claimants law, does not limit the recovery to the value of the rents and profits which had accrued before the rendition of the judgment in the original or ejectment suit.—*Adkins v. Hudson*, 392

9. Section 2 (2 R. S. 1852, p. 361,) of our criminal code must be construed to embrace only persons who, without the State, commit a crime, which, in legal contemplation, is to be deemed as having been committed within the State, under circumstances which will make the person thus committing it a principal in the crime.—*Johns v. The State*, 421

10. Section 219, 2 R. S. 77, does not apply to cases where frauds have been committed in obtaining judgments, but rather to the matter which is the foundation of the action to obtain the judgment, and not the proceedings or judgment based thereon.—*Quick v. Goodwin*, 438

STREETS.

See CITIES, 2, 3, 4.

SUBROGATION.

See MORTGAGE, 1.

SUNDAY.

See CRIMINAL LAW AND PRACTICE, 5.

SURETY.

See PRINCIPAL AND SURETY, 1.

SWAMP-LAND FUND.

1. The statutes on the subject of swamp-lands (1 G. & H., p. 597, *et seq.*) make full appropriation of the swamp-land fund to the payment of legitimate claims against that fund, and no further appropriation is necessary to authorize the auditor of State to draw his warrant, in a proper case, upon those funds.—*Lange, Auditor, etc. v. Slover*, 175

TAXES.

1. The lien for taxes does not attach on personal property until the duplicate is delivered to the collector.—*Barker v. Morton*, 146

TIME—COMPUTATION OF.

1. To determine the time when, after the stay of a judgment, an execution may issue, the day on which the replevin bail is entered should be counted.—*Tucker v. White*, 253

TOWNSHIP TRUSTEE.

1. Where a township trustee lends money belonging to the township, in such manner as to make the loan thereof a conversion of the money to his own use, and takes a note payable to himself, as trustee, etc., he would be liable, on his bond, for said money, but the township would have no right of action on such note.—*Robbins v. Dishon*, 204

2. In actions upon the official bonds of township trustees, for failing to pay over to their successors in office the money of the township in their hands, the State, on the relation of the person who is trustee at the time suit is begun, is the proper party plaintiff.—*Dishon et al. v. The State ex rel., etc.*, 255

TRUSTEE.

1. Where the property of an insolvent debtor is conveyed to a person in trust, to be by him sold and disposed of, for the benefit of the creditors of the assignor, and such person accepts said trust, and, in discharge of the duties thereof, converts all of said property, except one claim, into money, and distributes the same, *pro rata*, among all the creditors, except one, to whom he pays nothing, and, then, from motives of sympathy, indulges the party owing said uncollected claim until the same is barred by the statute of limitations, and is thereby lost, such trustee will be liable for the amount of said claim to the creditor to whom he had paid nothing, to an amount sufficient to make him equal, in the distribution of the entire proceeds of said property, with the other creditors.—*Simpson v. Gowdy et al.*, 292

UNCERTAINTY.

See PRACTICE, 1, 26.

See WILL, 5, 6, 7.

USURY.

1. Usury paid upon a debt, evidenced first by a note, made under the

law of 1852, on the subject of interest, and afterward by a note given by way of renewal, under the law of 1861, may be collected under the latter law, as both notes merely evidenced the same contract.—*Wood v. Kennedy*, 68

2. Wherever it is necessary that any person should consent to the interposition of the defense of usury in any case, such consent can be given, and made effective, without such person being a party to the suit.—*Gordon v. Montgomery*, 110

3. Where a usurious contract is made under the interest law of 1852, and the debt is renewed by a new note, given under the interest law of 1861, the excess over legal interest paid upon such debt, both before and after the act of 1861, may be recovered by the maker of such contract.—*Cowry v. Lewis*, 121

VACATION OF OFFICE.

See CONSTITUTIONAL LAW, 1, 2.

1. The acceptance of one lucrative office, by a person who is at the time the incumbent of another lucrative office, vacates the former.—*Kerr v. Jones*, 351

VARIANCES.

See OFFICES, 1, 2, 3, 4.

1. Variances between instruments sued on and those offered in evidence, where the defendant will not be prejudiced thereby, may be amended on the trial.—*Perdue v. Aldridge*, 290

VENDOR AND PURCHASER.

See LICENSE, 4, 5. ACTION, 1, 2.

SPECIFIC PERFORMANCE, 1, 3. MORTGAGE, 10.

1. Where real estate is sold on credit, and bond is given for title, upon the payment by the purchaser of certain notes, and said notes have all become due and remain unpaid, the obligor in the bond should first tender a deed to the purchaser, and then sue upon all the notes unpaid, and not a part only.—*Abdill v. Hamilton*, 5

2. In 1837, A agreed, by title-bond, to convey to B a certain tract of land, on the payment of two hundred dollars in hand, one hundred and thirty dollars on September 24, 1837; one hundred and twenty dollars September 24, 1838; one hundred and ten dollars September 24, 1839, and received the payment in hand. In 1837, B assigned his interest in the bond to C, who assigned his interest to D, and the latter paid to A the first of the deferred payments. D failed to pay the last two installments, and, after his

failure, in 1841, A, without having tendered a deed, or demanded payment of any one, sold the property to E, both A and E having notice of the assignment of the bond to D. E took possession of the property, and expended nine hundred dollars in improvements on it. In 1842, D assigned the bond to F, and, in 1850, the latter tendered to A the balance due on the property, and demanded a deed, and A refused to receive the money, or make a deed, or have any thing further to do with it.
Held, that F was entitled to recover of A the amount of money paid, with interest, because the acts of A sufficiently indicate an election, on his part, to rescind the contract evidenced by the bond.—*Fowler v. Johnson et al.*, 207

3. A merely voluntary executory contract, for the conveyance of land, will not be specifically enforced; nor will a voluntary deed be corrected of mistakes, on the application of the grantee against the grantor; but it will be, on the application of the grantor against the grantee, where, by mistake, the conveyance is for a larger estate than was intended.—*Randall et al. v. Ghent et al.*, 271

4. But an executed deed, made upon no consideration, whether one be expressed or not, is valid, and operative against the grantor. *Ibid.*

VENDOR'S LIEN FOR PURCHASE MONEY.

1. The taking of a mortgage to secure the payment of purchase money is an abandonment of the vendor's equitable lien for the same.—*Mattix v. Weand*, ✓ 151
2. The equitable lien for purchase money, once fairly and voluntarily abandoned, is lost forever. *Ibid.*
3. The vendor's lien for purchase money, of land sold by him, is paramount to the title of the wife by virtue of the marriage; but the wife, upon the foreclosure of a mortgage given to secure the payment of purchase money, in which she joined with her husband, is entitled to redeem, and no personal judgment can be taken against her, on such foreclosure.—*Patton v. Stewart*, ✓ 233
4. If a person having title to an estate, which is offered for sale, and, knowing his title, *stand by*, and encourage the sale, or do not forbid it, and thereby another is induced to purchase the estate, under the supposition that the title is good, the person, so *standing by*, and being silent, shall be bound by the sale, and neither he nor his privies shall be allowed to dispute the purchase.—*The Junction Railroad Company v. Harpold*, 347
5. But, if the person having the adverse claim is not apprised of his rights, or the purchaser knows them to exist, these principles do not apply. *Ibid.*

6. On the assignment of a land-office certificate of the location of land, there is no implied warranty of title.—*Johnson v. Houghton*, 359
7. In a matter embracing neither fraud nor covenant, the purchaser acts at his own risk, and voluntarily foregoes any remedy, if the title should fail. The rule *caveat emptor* applies. *Ibid.*
8. Where a transfer of real estate, or any interest therein, is defective in form, the transferee can not, for that reason alone, recover back the money paid therefor, but must first demand a correction of the error in the transfer. *Ibid.*
9. Judgment on an agreed statement of facts, substantially as follows: The land in controversy is part of ten sections reserved to A, an *Indian*, by treaty, in 1832, between the *United States* and the *Pottawattamie Indians*. The lands were to be selected under the direction of the President. A died in 1834, leaving two children and heirs, B and C, who conveyed to the plaintiffs' vendors. In 1838 the selections of lands were made, and patents issued to A, which, it is conceded, vested the title in the plaintiffs' vendors, and it is conceded that the plaintiffs have title, unless their vendors divested themselves of title by the following agreement, entered into between them and D, the commissioner appointed to make the locations, to-wit: "Agreement between E and F, and G and H, of the first part, and D, of the second part, witnesseth, that, whereas, said parties have conflicting claims upon ten sections of land, reserved, in 1832, by treaty, to A, now deceased, and the same having been inherited by his two sons, B, the elder, and C, the younger brother. The said E and F, and G and H, of the first part, relinquish and abandon all claim which they have upon the undivided half of said ten sections, inherited by said C, the younger brother; and the said D, the second party, on his part, in like manner, relinquishes and abandons all claim which he has upon the undivided half of said ten sections, inherited by said B, adult heir of said A. For the purpose of effecting a division of said sections, the following agreement is consented to by said party of the first part, and said party of the second part, provided and conditioned, that the same shall be confirmed and approved by the proper court, or courts, having jurisdiction thereof, when legal partition and division thereof shall be made, to-wit:" Here follow the stipulations as to the division, specifying the land in controversy, among others, to be taken as the share of said C, and by the terms of the agreement to go to D. The agreement then proceeds: "Said parties mutually agree to ask and solicit said court, in a reasonable time, to confirm the aforesaid partition, or to have commissioners appointed to make partition thereof according to law. The considerations of this agreement are a compromise and settlement by mutual relinquishment, as aforesaid, of the parties' conflicting claims upon said ten sections, the condi-

tions and stipulations aforesaid, and six hundred dollars, secured to be paid by said D to said party of the first part." Signed. It was further agreed, that, after the execution of the above instrument, D executed a conveyance of the land in controversy to the defendant, and that he, D, has since died; and, also, that the sole consideration for the execution of the above agreement was another agreement, executed by D concurrently therewith, which is also set out, but need not be copied here. This last-mentioned agreement, signed by D, recites that he had been appointed locating-commissioner, and that he was satisfied that E, F, and others, naming them, were purchasers and owners of certain reservations; it then proceeds to make the locations, and then stipulates, among other things, as follows: "All of which said selections and locations I will report to the proper land-officers, and will, if no legal objections to the same are found to exist, then report the same to the Secretary of War, or the President of the *United States*, and desire the same confirmed; or, should such objections be raised as prevent the confirmation of these selections, then the said persons interested may select other lands, which I will report, etc.; nor will I allow any other person or reservee to interfere with the selections these individuals make, but will see that their selections are confirmed," etc.

Held, That the contract and facts set out did not constitute an executed, but merely an executory agreement; and that, in determining whether the agreement should be held to be executed or executory, the facts, that it was not under seal, and contained no words of inheritance, together with its other provisions, were entitled to consideration.—*Brown v. Ewing et al.* 373

10. Where land is sold as containing a certain number of acres, and a survey is made of it at the time, in presence of the grantor and grantee, and the latter takes possession, and occupies it over fourteen years, and the facts show that neither party contemplated going further upon the land of the grantor, in the direction in which the residue of his land was situated, than the survey indicated, and there was no fraud, or misrepresentations, or written contract broken, and the residue of the grantor's land was admitted by both parties to have been of much greater value than the part sold, but the land sold proves to contain a few acres less than the parties, at the time, supposed it did contain.

Held, that the grantee can not compel the grantor to make up the deficiency by conveying other land, etc.—*Jacoby v. Beckett et ux.*, 395

VOLUNTEERS.

1. A volunteer in the army of the *United States*, as a private, who is under the age of eighteen years, can not be compelled to continue in the service by virtue of his enlistment.—*Wantlan v. White*, 470

2. Since February 13, 1862, no consent of any one can give power to enlist a minor under the age of eighteen years. *Ibid.*
3. And such a minor, so enlisted, and restrained by officers against his will, could probably maintain an action for damages against such officers. *Ibid.*
4. The provision in the act of Congress, that the oath of enlistment taken by a recruit shall be conclusive as to his age, can not operate to conclude the parent or guardian of such recruit, if a minor, under the age aforesaid, nor to authorize the officers to retain him without the consent of such parent or guardian. *Ibid.*
5. *Semblé*, that it is not competent for the legislative power to declare what shall be conclusive evidence of a fact. *Ibid.*

WAGER.

See PLEADING, 7.

WAIVER.

See HIGHWAYS, 5, 6.

See PROMISSORY NOTES, 8. CONTRACTS, 9. PLEADING, 22. PRACTICE, 25.

1. The failure to demur to the complaint, or move in arrest, as a general rule, is a waiver of objections thereto.—*McClure v. McClure*, 185
2. After an action has been dismissed by the plaintiff, and then reinstated upon the docket, the voluntary appearance of the parties to the action, and submission of it for trial to the court, amount to a waiver of the dismissal.—*Mahon v. Mahon's Administrator*, 324
3. A voluntary appearance, in full, to a cause of action, waives all defects in process or publication.—*Free et al. v. Haworth*, 404
4. As to waiver of defects in the articles of association, by the State, see the case of *The State ex rel., etc. v. Bailey et al.*, 452

WARRANT OF ATTORNEY.

See JUDGMENT BY CONFESSION, 1. MARRIED WOMEN, 4.

WARRANTY.

See CONTRACT, 12.

1. On the assignment of a land-office certificate of the location of land, there is no implied warranty of title.—*Johnson v. Houghton*, 359

WIDOW.

*See LANDLORD AND TENANT, 2.**See WILL, 5, 6, 7.*

1. Where advancements have been made by the father to his children in his lifetime, and he dies, his estate, out of which his widow shall be entitled to a distributive share under the statute, shall be what remains, exclusive of the sums advanced.—*Willets v. Willets et al.*, 22

WIDOWER.

See DESCENT.

WILL.

1. Under the laws of *Indiana*, a married woman may devise her separate property, and it is not necessary that the husband should concur in, or be in any way a party to, the will of his wife disposing of her separate real estate.—*Noble v. Enos*, 72
2. As to what constitutes a correct instruction from the Court to the jury, in a case in which the validity of a will is attacked on the ground that it was procured by fraud, duress, or undue influence, the reader is referred to the opinion at length. *Ibid.*
3. In an action to set aside the will of a married woman, because it was procured by fraud, duress, or undue influence, it is error to admit testimony designed to prove that a part of the property disposed of by the will was purchased and given to the testatrix by her husband, because the will could only operate upon such property as belonged to the testatrix, both in fact and law. *Ibid.*
4. In 1858 A died, leaving a widow, five children, and seven grandchildren. His will contained these provisions: “2. I give and bequeath to my wife two beds and bedding, to be selected by her, twenty-five dollars a year, as long as she lives, and a good, comfortable support during her life; also, the use, during life, of the house we now occupy, together with the furniture and other articles necessary to keep house. 3. I give and bequeath to my grandchildren [naming them] one hundred dollars each. 4. After the payment of all legacies, I give and bequeath to my children, [naming them, *John Wilson, Jr.*, being one] and my grandchildren, [naming them] and their survivors, all my estate, both real and personal, to be divided among them, said grandchildren to take jointly one-sixth thereof. 5. If my wife dies before me, or, surviving me, does not accept the provisions of this will, then I direct that all my real estate be sold by my executor, at public or private sale, as he may think best; if at public sale, for not less than two-thirds of the appraised value thereof; if at private sale,

at the full appraised value, etc. 6. If my wife survives me, and accepts the provisions of this will, then I direct that none of the legacies, except the provisions for her, be paid until her death. Immediately after her death, I direct that my real estate be sold as provided for in item 5 of this will; the special legacies to be paid first out of the proceeds of such sale, and after the payment thereof, the balance of such proceeds, and all my personal estate, be distributed among my children and grandchildren, as directed in item 4 of this will." Said will was admitted to probate, and the widow accepted its provisions, and entered into the possession and enjoyment of the real estate thereby devised. In 1859, B recovered a judgment against said *John Wilson, Jr.*, in the *Morgan* Circuit Court, upon which execution was issued, and levy thereof made on his interest in said real estate.

Held, that *John Wilson, Jr.*, under the provisions of said will, had a vested interest in said real estate, which, under the law of this State, is subject to levy and sale on execution.—*Wilson's Executor v. Rudd*, 102

5. A testator disposed of his property as follows: "I will and bequeath to my wife, for her lifetime support, all my personal property of which I may die seized or possessed. And, also, I will and direct, that all my real estate, if any, remaining unsold at the period of my decease, be sold to the best advantage, as soon as convenient after my decease, and the money secured, and appropriated with all the above-mentioned personal property, and also subject to and for the proper support of my wife during her natural lifetime; and at her decease, the total amount of the above-mentioned personal property, and money and claims, I will and hereby bequeath to my nephew, *John Piercy*, except any sum thereof, less than four hundred dollars, which amount my wife may, as she choose, dispose of by bequest, and only received after her decease as such legacy by her." Over twenty months after the testator's death, the widow elected to reject the provisions of the will, and to take under the law, and then sued to set aside the will for uncertainty, etc.

Held, that in the absence of any statute fixing the time within which she shall make her election, the widow may make the same at any time, and lapse of time will not affect her right to take under the law.—*Piercy v. Piercy*, 467

6. *Held*, also, that said will was not void for uncertainty, but discloses sufficiently the testator's intentions. *Ibid.*

7. *Held*, also, that the widow, having rejected the will, was entitled to one-third of the testator's property, in addition to the sum allowed to any widow. *Ibid.*

WINE.

See CRIMINAL LAW AND PRACTICE, 13.

WIFE.

See PARTIES, 2.

WITNESS.

See BASTARDY, 1. PRACTICE, 23.

1. Prior to the witness-law of 1861, where a party to an action was called as a witness by the adverse party, and, on his examination, gave testimony not responsive to the inquiries addressed to him, then the party calling him might offer himself as a witness as to the matter embraced in said testimony.—*Daniels et al. v. Little et al.*, 305

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